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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 834

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA, *ex rel.* ANTHONY RUSSO and UNITED STATES OF AMERICA, *ex rel.* FRANK BISIGNANO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The State of New Jersey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 20, 1965.

Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix herein, *infra*, pp. 1a to 30a, are reported in 351 F. 2d 429 (3 Cir. 1965).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing, which petition was denied on October 13, 1965.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

Questions Presented

1. Does the rule of *Escobedo* v. *Illinois* require the suppression of free and voluntary confessions by state prisoners who have neither requested nor been refused counsel, solely because the investigating authorities did not advise the suspects of their right to remain silent, of the fact that anything they said might be used in evidence or of their right to consult with counsel?

2. Is the decision in *Escobedo* v. *Illinois* to be accorded retroactive operation so as to allow collateral attacks on judgments of conviction which became final before that decision was rendered?

Constitutional Provision Involved

The relevant constitutional provision involved in the instant case is the Sixth Amendment of the United States Constitution which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement of the Case

On March 15, 1961, at approximately 11 P.M., Joseph Hagel was shot and killed by Anthony Russo in Hahn's Tavern in Newark, New Jersey, in the course of an attempted robbery by Anthony Russo, Frank Bisignano and Robert LaPierre. At the time, Russo, armed with a .32 caliber automatic and Bisignano, carrying a hunting knife in his pocket (5T. 1551),* had entered the tavern while LaPierre remained in the back seat of a Chevrolet with the motor running. All three fled the scene abandoning the car. Russo and LaPierre were apprenhended the same evening within blocks of the tavern. Bisignano was apprehended the next morning at the entrance to Russo's apartment.

Preparations had been made for a holdup early in the evening of March 15, 1961. Sometime around 7 P.M. the three defendants, together with one Chris Vespucci and a Rocky DiMuzio, set out in Bisignano's truck (1T. 103 to 106) to obtain a car because "they needed it for a getaway car" (1T. 110). The car, a cream and dark rust color 1958 Chevrolet Delray (1T. 141) with the ignition unlocked (1T. 143) was stolen from a parking lot at 70 South Munn Avenue in East Orange, diagonally across from East Orange General Hospital.

The gap in the State's proofs, accounting for the time spent by the defendants between the stealing of the car and the arrival in the area of Hahn's Tavern, was caused by a ruling of the trial court on the testimony of one Sarah Schimmel (1T. 218).

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* This and similar references are to the transcript of the trial, indicating both volume and page.

With regard to the happenings at Hahn's Tavern, the State's proofs indicated that Joseph Hagel entered Hahn's Tavern at about 10 minutes to 11 (1T. 238) and that he sat at a bar stool. At 11 P.M. Hahn changed channels on the television set (1T. 245) and "well, while we were watching or listening to the late news the door opened" (1T. 246).

> "Q. Two men walked in, then what? A. Well, one walked in about 10 feet inside the door and stood there and the other one continued up near to where we were sitting." (1T. 246)

Both of them had dark hats, dark glasses and dark trench coats (1T. 249). Both men (early in the State's case Bisignano was referred to as "E" and Russo was referred to as "F" by the witnesses) had their hands in their pockets and Russo announced "Don't anybody move, this is a stick-up, give us the money" (1T. 252 to 253). At the time Russo "pulled his hand out of his trench coat pocket and held a gun" (1T. 253). The tavern owner, Mr. Hahn, said (1T. 254), "well, I didn't observe anything but the flash from the gun and the noise and Mr. Hagel getting off the stool and firing back and the two of them firing at one another." Hahn further testified under questioning by the Court (1T. 256):

> "Q. Can you tell us the direction from which the first flash came? A. Yes.
>
> Q. From where? A. From F's gun.
>
> The Court: From F's gun. All right."

Bisignano had taken a position as described with his hands in his trench coat pocket (1T. 250 to 251) and Joseph Hahn said, "When I was told this was a stickup he made one step toward the bar" (1T. 204).

Following the shooting Hagel lay on the floor mortally wounded. He was promptly removed from the scene but died of two bullet wounds, one "in the front left side of the abdomen" and the second "in the lower left abdomen" (1T. 82 to 84). At approximately 11:20 P.M. Hagel was received at Martland Medical Center; "he was dead on arrival" (1T. 77).

Bisignano ran toward the door "approximately after the second shot" (1T. 311). Russo, during the shooting, ran for the door, fell down, lost his hat and glasses, arose and continued his escape (1T. 258). When Russo left the tavern he was wounded. LaPierre, who had started out of the automobile upon hearing the shots, came to his rescue and assisted him through a series of back alleys for several blocks to the area of Montclair Avenue. In the attempt to make good the escape, Russo and LaPierre were forced to abandon some money which LaPierre was holding, as well as Russo's trench coat.

LaPierre who admittedly had recommended Hahn's Tavern as "a good place to stick up" was apprehended as he approached Montclair Avenue while Russo hid in a driveway. It is significant that as soon as LaPierre was apprehended "as soon as I grabbed him by the arm, he said 'I didn't rob him'" (2T. 581). Bisignano, unhampered as were the other two defendants, made his way to Broadway where he took a bus back to Russo's apartment. He then took Russo's girl friend, Veronica Szematowicz, to his home in Lodi where he, with his wife and Veronica, attempted to construct an alibi. Prior to developing his alibi, Bisignano told Veronica substantially all of the events surrounding the killing of Joseph Hagel. Bisignano was apprehended with Veronica as they returned to Russo's apartment the next morning. At trial, each defendant had a defense. LaPierre suggested that he was never part of the conspiracy

to rob Hahn's Tavern, that if he was, he abandoned the enterprise (DLb12-32) and that at best he was guilty of a violation of N.J.S. 2A:85-2, a statute dealing with assisting an escape.

Bisignano indicated abandonment as his defense. He admitted he and Russo cased the tavern but decided not to hit it. They went in for a beer and Bisignano ran out when gun play was indicated. He never heard Russo say, "This is a stickup" (5T. 1556).

Russo was never going to rob Hahn's Tavern. He was going to "case" the place for "Rocky" but significantly he rejected it because it was too crowded that night (5T. 1594; 5T. 1640). Russo also contended he was either insane or drunk or under the influence of narcotics or all three.

Because defendants argued that the written statements made by them were improperly admitted into evidence, the factual circumstances surrounding the taking of those statements and also the taking of LaPierre's statement deserve scrutiny.

A.

The defendant LaPierre was questioned at the Newark Police Headquarters on the morning of March 16, 1961, at which time he apparently gave an oral statement. The oral statement was commenced about 12:15 or 12:30 (3T. 796) at which time LaPierre indicated to Sgt. Buerle the details of the holdup (3T. 800). As the result of the information received from LaPierre, Bisignano was questioned (3T. 803) and then LaPierre was taken out with a photographer. At that time photographs (S-68 A through J) were taken and physical evidence was recovered including some money and Russo's raincoat (3T. 810). LaPierre was then taken

back to Police Headquarters where a written statement, (S-72), was taken from him from approximately 3:15 to approximately 6:45 P.M. (3T. 823). No objection was made with regard to the voluntariness of LaPierre's statement and there was no objection by his attorney with respect to the voluntariness of any admissions made by LaPierre (3T. 797, 818, 820, 821). Bisignano was being questioned at police headquarters at the same time as was LaPierre. Each knew the other was present (3T. 969).

B.

Bisignano, aged 22 and then on parole under a conviction for grand larceny, was apprehended at about 11:15 A.M. (3T. 871) and was brought to police headquarters for questioning. He was questioned starting at about one-quarter to twelve (3T. 845). His answers were apparently checked with those given by LaPierre and Veronica Szematowicz (3T. 845). The officers then had a conversation with LaPierre (3T. 846) and then Lt. Kinney, Detectives Leonardis, Scruese and Sgt. Buerle questioned Bisignano again (3T. 847). Lt. Kinney indicates that Bisignano was questioned from 3:15 P.M. to sometime between 6 and 6:45 P.M. during which time "we had some sandwiches and coke, cigarettes, I think" (3T. 885). Lt. Kinney further said that Bisignano was questioned from 12 to 1:30; that Bisignano was not questioned from 1:30 to 3:15 and that a statement was taken from him from 3:15 to 6:30 (3T. 887 through 889).

March 16, 1961, was a Thursday. The record indicates that after Bisignano was questioned he was not brought before a magistrate until the following Monday (3T. 983). There is no dispute, however, that the statement was taken from Bisignano on the afternoon of March 16 before 7:00 P.M. and that following the taking of the statement, Bisig-

nano was allowed free access to visitors. In his appeal to the Supreme Court of New Jersey Bisignano confined his complaint of mistreatment to the time between his being brought into headquarters and the time he was taken out to Kinney's office at about 3:15 P.M. (3T. 976, 952).

Here, admittedly, there was no prolonged questioning; admissions were made by Bisignano by 6:00 P.M., and indeed Bisignano himself indicated that he was taken out of the interrogation room at about 3:00 P.M. (3T. 952).

The officers specifically denied any mistreatment of Bisignano during the questioning (3T. 922, 929, 903). Bisignano and LaPierre read their statements at the same time, and there was no suggestion by LaPierre that Bisignano was mistreated then or at any time in his presence. LaPierre's total evidence on brutality consisted in his hearing Bisignano shout, "What am I doing here?" (3T. 937) and noticing a bump on his head (3T. 938) and black and blue marks on his forehead (3T. 940).

Bisignano admits that he was taken to court the following Monday morning (3T. 983) and was brought before Newark Magistrate Castellano (3T. 984). His photograph was taken immediately after he signed the statement introduced into evidence by the State (S-74), and his photograph was taken again by the Sheriff's office when he was received in the Newark Street Jail the following Monday. That photograph was also introduced by the State (S-75; 3T. 1031). On the day following his interrogation he was visited by his brother-in-law (3T. 1002), his mother, his father and his wife. Each testified that he touched a different part of Bisignano's body and elicited complaints (3T. 1004, 1008, 1011).

Although he claimed he was beaten by 10 or 11 officers, the photographs in evidence do not support the contention

and the medical form filled out at Newark Street Jail (3T. 1032) is devoid of any complaint. Raymond C. Apgar, a jail trustee, indicated that Bisignano complained of headaches "and he couldn't sleep so good" (3T. 1028).

Bisignano admitted he complained of athlete's foot (3T. 985) and "above my left eye", and admitted he was treated for the athlete's foot (3T. 989).

C.

Defendant Russo, aged 21 and awaiting sentence for armed robbery, was taken to the Martland Medical Center in the early morning hours of March 16 because of the bullet lodged in his right arm. The bullet, which had been fired by Hagel during the holdup attempt, was not removed until Russo gave permission on March 17, and then it was extracted by operation by Dr. Donato (3T. 706). The operation was a simple one (3T. 708) and Russo was released from the hospital on March 23 (3T. 706). He was taken from the hospital to Newark Police Headquarters where he gave a statement because, (according to Russo), Sgt. Buerle said, "if I didn't sign the statement and make a statement he was going to take the typewriter and smash it on my arm" (4T. 1192, 1193).

Russo also indicated that a police officer hit him on March 16 as he entered the hospital (4T. 1186) and that prior to the operation on the 17th Scurese tortured his arm, by "poking at it" (4T. 1190).

Nurse Scott testified that on March 21 she examined the arm and noticed welts (4T. 1207), but there is no testimony from anyone to suggest that the welts were caused by other than the bandage and the tape. At the hearing in the District Court Nurse Scott indicated that the welts first appeared some 10 or 15 minutes following an injection of

medication she administered pursuant to doctor's orders (A53a).* Dr. Donato indicated that the welts may very well have been an allergic reaction, although he could not rule out trauma as the cause (A48a). When Dr. Donato testified for the State as to the operation, the defendant Russo reserved the right to call him as his witness (3T. 709), but Dr. Donato was never recalled. Nurse Hall also described a facial injury which two hours after hospital admission "was more visible than when he was admitted" (4T. 1206). The same nurses noted that police officers came 37 minutes *after* the ice pack was applied to Russo's face. The detectives who questioned Russo immediately following his hospital admission denied touching him (4T. 1177).

In addition, testimony given at the District Court hearing by Nurse Jean Weiner, in some respects favorable to Russo, was found by Judge Augelli to be less than impressive, and in the main hearsay, which in material respects was denied by other witnesses (A73a). Nothing of substance was added to that already before the State tribunals (A76a).

Sgt. Buerle for the State, testified that he had a conversation with Russo on the 17th (4T. 1138) and on the 24th (4T. 1141). Detective Scurese indicated that he called at the hospital with Detective Leonardis right after the bullet was removed and that Russo gave an oral statement at that time (4T. 1222 to 4T. 1224). The detectives involved specifically denied any threat or violence. The written statement given on the 24th was admitted into evidence as (S-81) (4T. 1234). At the time of the written statement, Russo had been in police headquarters only a short time.

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* This and similar references are to defendant Russo's Appendix filed as part of the certified record in the court below.

The police officers who questioned him denied any mistreatment. The cross-examination of Sgt. Buerle (4T. 1149 to 1151) indicates that the statement was commenced about 1:00 P.M. and finished at 4:05 P.M.; that the defendant was cooperative with the police.

> "Q. He would be happy to give a statement? A. Well, he didn't say he would be happy but he said he would give us a statement."

Russo was in headquarters less than five hours (4T. 1151). Prior to that he was in the hospital where he was regularly attended by doctors and nurses.

To put all of the testimony regarding Russo's confession in context, it clearly appears that Russo would admit nothing while he felt that he was frustrating detection by retaining the bullet from Officer Hagel's gun in his arm. When the bullet was removed, Russo felt that he had given the police the evidence they needed and the details were of little consequence. He thereafter voluntarily made a statement and re-enacted the crime for the police. It is significant that the defendant makes no claim of brutality concerning the re-enactment (S-84) of the crime on March 25, 1961 (4T. 1257).

An appeal by LaPierre and defendants Bisignano and Russo resulted in an affirmance of the convictions. *State* v. *LaPierre*, 39 N. J. 156 (1963). Bisignano's petition to the Supreme Court of the United States for the issuance of a writ of certiorari to the New Jersey Supreme Court was denied. 374 U. S. 852 (1963).

Thereafter, each of the defendants filed a petition for federal *habeas corpus* relief with the United States District Court (New Jersey). Bisignano's petition was argued before the court on September 26, 1963. With re-

gard to the petition of Russo, testimony was taken and argument had before the court on October 7 and 8, 1963.

Thereafter, the petitions were consolidated by the court for the purpose of decision, and on February 13, 1964, United States District Court Judge Anthony T. Augelli filed an Opinion and Order denying both petitions. Defendants thereafter filed an appeal from the denial of *habeas corpus* relief with the United States Court of Appeals for the Third Circuit. On May 20, 1965, that court reversed the judgment of the United States District Court for the District of New Jersey and granted the defendants' petitions for writs of *habeas corpus*.

On June 1, 1965, the State of New Jersey filed a petition for rehearing in the United States Court of Appeals for the Third Circuit. That court, in an order filed on October 13, 1965, denied the State's request for a rehearing.

Reasons Why a Writ of Certiorari Should Be Granted

Preliminary Statement

The State is aware of the fact that this Court has very recently granted writs of certiorari in cases involving similar questions as those here presented. It is respectfully urged, however, that the total conflict in interpretation of the rule of *Escobedo* v. *Illinois* and the dispute regarding the retroactive application thereof which presently exists between the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit in this case as well as pending cases can be resolved only by the granting of a writ of certiorari in the present case.

POINT I

The United States Court of Appeals for the Third Circuit has erroneously expanded the rule of *Escobedo* v. *Illinois* and, thereby, has decided important questions of federal constitutional law which have not been determined by this Court.

A. The decision below changes existing constitutional doctrine.

The court below did not reverse the murder convictions of Frank Bisignano and Anthony Russo because it deemed their confessions to have been involuntarily obtained. In fact, the opinion forthrightly rejected the claims of physical and psychological coercion. The basis for the reversals was the finding that the police had obtained confessions without first having advised defendants of their right to remain silent, of the fact that anything they said might be used as evidence in a trial, or of their right to counsel at a stage when the right to counsel had attached. However, the court did *not* find that these omissions rendered the confession involuntary.

The opinion relies principally upon the cases of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Massiah* v. *United States*, 377 U. S. 201 (1964); and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). The court noted that under *Gideon*, a criminal defendant in a state court has the "same right to counsel" as a criminal defendant in a court of the United States. With this analysis, the State is in agreement. But the court below went further and stated, "the effect of *Gideon* has been to expand the right to counsel and there has been a widening of the concept of the stage or stages when that right attaches." There does not appear to be any language in the *Gideon* case to support the notion that

this Court intended to bring about a substantive expansion of the right to counsel within the meaning of the Sixth Amendment. More accurately, the Sixth Amendment right was afforded to state criminal defendants who, because of the holding in *Betts* v. *Brady*, 316 U. S. 455 (1942), had not previously been entitled thereto.

The court below discussed the decisions in *Massiah* and *Escobedo*, stating preliminarily, "these cases hold that where the right attaches any confession obtained in the absence of counsel must be suppressed independent of any issue of the voluntariness of the confession." (351 F. 2d at p. 436.) The State takes issue with that statement and urges that neither case goes so far as the Third Circuit's opinion suggests.

Winston Massiah's incriminating statements had been obtained through surreptitious tactics at a time when he was under indictment, was without counsel, and was completely unaware that his conversation was being electronically transmitted to a strategically situated federal officer. This Court noted that as the case involved a federal prosecution, the Sixth Amendment was directly applicable and that incriminating words, secretly obtained in the absence of counsel, could not be introduced in evidence. The concluding sentence of the majority opinion reads, "all that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." (377 U. S. at p. 207). *Massiah*, like *Gideon* before it, represents judicial application—but not expansion—of the right to counsel.

Escobedo was surely a logical follow-up to *Massiah*. Confronted with a defendant who had confessed without the assistance of counsel during accusatory police interroga-

tion, this Court found that "it would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." (378 U. S. at p. 486.)

The defendant in *Escobedo* had confessed without having first been effectively warned of his absolute constitutional right to remain silent. In addition, during the time that he was being interrogated, he had repeatedly requested and been denied the opportunity to consult with his lawyer who was present in another room at the police station. Mr. Justice Goldberg, writing for the majority, held as follows:

> "we hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright*, 372 U. S., at 342, 83 S. Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.' " (378 U. S. at p. 491.)

The court below acknowledged that the present case is factually distinguishable from *Escobedo* in that here neith-

er defendant ever requested that counsel be present. Nevertheless, the court found no adequate basis for distinguishing *Escobedo* because of the factual differences, holding, *inter alia*:

> "The distinction, if there be one, must rest on the absence of a request by Bisignano and Russo to have counsel present during the interrogation. But both reason and precedent dictate against such a distinction.
>
> "At every other stage of the proceedings at which a right to counsel attaches, the right does not depend on a request for counsel nor can it be presumed that failure to request counsel constitutes a waiver of that right. . . .
>
> "We can perceive no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other. . . ." (351 F. 2d at p. 437.)

It is submitted that the Third Circuit merged two separate and distinct concepts, *to wit*, the *right* to counsel and the *denial* of the right to counsel. In *Escobedo* it was held that the right to counsel attached when the investigation by the police reached the accusatory stage. The decision is concerned with the effect of police action which affirmatively denied the accused the requested opportunity to consult with his lawyer, and which denied the latter the opportunity to consult with his client. From the particular language contained in the decision, it is apparent that this Court intentionally limited its holding to the precise facts present. It may be said that the opinion is a judicial formula containing the elements which if present constitute the denial of a constitutional right. Nowhere in *Escobedo*

does this Court hold that a confession secured in the absence of counsel must be suppressed if the right to counsel has attached. Actually, as was pointed out by Mr. Justice Harlan in his dissenting opinion, neither *Escobedo* nor any other decision of this Court holds that the Constitution requires the police to affirmatively give "advice" to an accused person.

In interpreting *Escobedo* as it did, the Third Circuit excised the element of request which this Court presented as a prerequisite to a finding of denial of the right to counsel. Judge McLaughlin recognized this fact in his dissent to the denial of the State's request for a rehearing in the present case:

> "If the Supreme Court desires not merely to widen the *Escobedo* rule but to strike from it one of its three required elements and so promulgate a new test, that is up to the Supreme Court alone. Without that action an intermediate appellate tribunal has no duty and no right to make such pronouncement. In so doing, proper law enforcement under the Supreme Court mandate is unwarrantably confused, weakened and broken down." (351 F. 2d at pp. 441-42.)

An additional effect of the decision below is the invalidation of the confession because the record did not disclose affirmative waiver of the right to counsel by the accused. The essence of the holding is the imposition upon the State of the obligation to show that no waiver had occurred. The Constitution does not compel such a burden. It may be queried whether the court in *Russo* would require the advice of counsel as a prerequisite to intelligent waiver. The blanket ruling of the court below presupposes a common and uniform standard of rights awareness or lack thereof

among all criminal suspects. Such uniformity does not exist. In the case *sub judice* the defendants had prior experience with the law. Russo exhibited a keen appreciation of his constitutional rights in refusing to permit the removal of an evidential bullet from his arm until the pain became so excruciating that he could refuse no longer. Bisignano had determined prior to coming into police headquarters to tell the police a fictitious story which he and Russo's girlfriend had contrived during the night.

The Third Circuit's opinion abandons the traditional concept of voluntariness in determining the validity of a confession and broadly holds that a confession, obtained by the police in the absence of counsel, is invalid unless it be shown that defendant was told of and waived his right to counsel. The concept produces as many perplexing problems as it impliedly purports to overcome. For example, if it is conceded that police testimony regarding the elements of voluntariness might conceivably be fabricated, it must also be conceded that dishonest testimony could easily be given to the effect that a defendant was advised of his rights and that he waived them. It does not seem unreasonable to predict that any *intelligent* defendant will ask for a lawyer if told that he has a right to have one present. Only an individual who has no idea whatsoever of the importance of counsel can be expected to waive the right. The Third Circuit's approach is intellectually dishonest and denies equal protection of the laws because it places an unwarranted premium on the ability of an intelligent defendant to act upon the advice given to him by the police.

The State urges that *Escobedo* was properly limited to the particular facts involved. But even if the rule of *Escobedo* is to be enlarged, the impetus should be from this

Court, because only this Court has the authority to do so. It has long been established in the federal system that a court of appeals may not object or obviate the teachings of decision of the United States Supreme Court, even though it may be true that a given Supreme Court decision has been criticized or appears unlikely to be followed in a future decision. *Cf., Stell* v. *Savannah-Chatham County Board of Ed.*, 333 F. 2d 55 (5 Cir. 1964), cert. den. 379 U. S. 933 (1964). The philosophy is well expressed by the Supreme Court of New Jersey in the decision of *Schlemm* v. *Schlemm*, 31 N. J. 557, 571, 158 A. 2d 508, 516 (1960), wherein it is said:

> "The strength of our democracy rests largely upon the constitutional guarantees which the courts enforce and the greatness of our nation is measured largely by the readiness of its people to accept and observe constitutional interpretations and applications by the designated final arbiter, the United States Supreme Court. We, as state judges, would indeed disserve the interests of our country if, because of conflicting local policies, we in any wise sought to disregard or evade the decisions of the Supreme Court as to the meaning and effect of the Federal Constitution."

B. The Third Circuit's interpretation of *Escobedo* conflicts with decisions of other United States Courts of Appeals and serves to interfere with the orderly administration of criminal justice.

The interpretation of *Escobedo* in the decision below conflicts with holdings of the United States Court of Appeals for the Second, Fourth, Fifth, and Seventh Circuits as well as that of the District of Columbia. On November 22, 1965, the United States Court of Appeals for the

Second Circuit decided two confession cases, *United States* v. *Robinson*, —— F. 2d —— and *United States* v. *Cone*, —— F. 2d ——, and held that *Escobedo* did not require that a suspect must be advised of his right to silence and of his right to counsel before he is questioned or makes any statement to the police. Acknowledging that "immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as solving the crime," the court in *Cone* noted that under such circumstances, "the police should not be forced unnecessarily to bear obstructions that irretrievably forfeit the opportunity of security information under circumstances of spontaneity most favorable to truth telling and at a time when further information may be necessary to pursue investigation, to apprehend others, and to prevent other crimes."

In *Davis* v. *State of North Carolina*, 339 F. 2d 770 (4 Cir. 1964), the defendant had not requested the assistance of an attorney during the time he was being questioned by the police. The court concluded that this fact was one which distinguished the rule of *Escobedo*. Similarly, in *Edwards* v. *Holman*, 342 F. 2d 679, 683-84 (5 Cir. 1965), the Fifth Circuit distinguished *Escobedo* from the case before it on several grounds including the fact that in the former there had been a request for counsel and denial of the opportunity to consult with lawyer while in the latter, "it does not appear that Edwards requested or was denied assistance of counsel prior to his confession."

United States v. *Childress*, 347 F. 2d 448 (7 Cir. 1965) involved an appeal from conviction of armed robbery in which defendant argued the applicability of *Escobedo*. The Seventh Circuit affirmed the judgment of conviction, stating:

> "The record before us does not show that defendant ever requested, or was denied an opportunity to con-

> sult with a lawyer. Hence the principle announced in Escobedo has no application in the case at bar. Moreover, the argument made on defendant's behalf that there can be no presumption of a waiver of counsel . . . is not applicable to this case, because, unless his right to counsel was established by the denial of a request by defendant for an opportunity to consult with his lawyer or a lawyer, he had no such right which could have been the subject of a waiver." (347 F. 2d at 40)

Accord, *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837, 843 (7 Cir. 1964), *cert. den.* 379 U. S. 984 (1965).

In *Cephus* v. *United States*, —— F. 2d —— (D. C. Cir. 1965), the United States Court of Appeals for the District of Columbia had before it the contention that because defendant had no counsel during a post-preliminary hearing jail-house interview, the confession therein obtained by the police must be suppressed. In rejecting that contention, Judge Burger, writing for the majority, concluded:

> "The *Escobedo* holding must be read in light of its facts and especially of the purposeful exclusion of Appellant's waiting lawyer from an opportunity to counsel his client while police pursued their interrogation. There, as in *Massiah*, affirmative police action existed preventing counsel and advice after the time when as the Supreme Court decided on the facts in those cases, the right to consult with counsel had attached. Nothing resembling that is shown here. . . ."

In addition to creating a conflict with other United States Courts of Appeals, the decision below has resulted in what might fairly be described as a *bona fide* crisis within the

physical boundaries of the Third Judicial District of the United States. The Third Circuit itself recognized the seriousness of the problem in its per curiam opinion denying a rehearing in this case wherein it is said, "the issues involved in the instant cases are of such importance that they should be put before the reviewing tribunal as promptly as possible." (351 F. 2d at p. 441.) At the present time, the judges of the Third Circuit do not agree among themselves as to what *Escobedo* means (see rehearing denial opinion in *Russo, infra*). The Supreme Court of New Jersey has consistently held that in the absence of a request to consult with an attorney, an accused's right to the assistance of counsel has not been denied. *State* v. *Coleman*, —— N. J. ——, —— A. 2d —— (1965); *State* v. *Ordog*, 45 N. J. 347, 361-62, 212 A. 2d 370 (1965); *State* v. *Lanzo*, 44 N. J. 560, 566-67, 210 A. 2d 613 (1965); *State* v. *Bindhammer*, 44 N. J. 372, 384, 209 A. 2d 124 (1965). In the *Coleman* case, *supra*, the Supreme Court of New Jersey commented upon the decision below and stated:

> "In the course of its decision, the Third Circuit went beyond the actual holding in *Escobedo* and construed the Supreme Court's opinion as broadly invalidating confessions such as those made by the defendants Russo and Bisignano while in custody and without counsel, no request for counsel having been made by them. The view thus expressed, while binding in *Russo* (subject to any further review in the Supreme Court), is not binding on us in other cases which come before us in the exercise of our acknowledged State jurisdiction. In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court." (—— N. J. at p. —)

The Supreme Court of Pennsylvania, while disagreeing with the Third Circuit, now regretfully abides by the latter's holding in the present case solely in order to assure that judgments may be clothed with finality. Until the decision in the present case, the State of Pennsylvania was in accord with the New Jersey position on *Escobedo*. *Commonwealth* v. *Patrick*, 416 Pa. 437, 206 A. 2d 295 (Sup. Ct. 1965). However, in the recent decision of *Commonwealth* v. *Negri*, —— Pa. ——, —— A. 2d —— (Sup. Ct. 1965), the Supreme Court of Pennsylvania reversed its previous position and held that it was bound to follow the interpretation contained in the decision below by the United States Court of Appeals for the Third Circuit. The announced basis for the reversal of position was that in light of the existence of the decision in *Russo*, a defendant convicted in Pennsylvania could, for all practical purposes, "walk across the street" and gain a different result in the Court of Appeals. Thus, acknowledging that the situation presented a serious conflict between sovereign jurisdictions, the Pennsylvania Court, in the desire to secure finality of judgments, elected to follow the Third Circuit ruling "until some further word is spoken by the Supreme Court of the United States."

Because of the conflict and confusion which exists in the United States and particularly in the Third Judicial District thereof, the State of New Jersey respectfully urges this Court to grant a writ of certiorari in the present case. Only through the granting of the writ will the interpretative differences between the Third Circuit and the Supreme Court of New Jersey be resolved. Most importantly, a decision from this Court in the present case will serve to educate and guide those charged with the responsibility for law enforcement and will enable them to understand what must be done to assure that persons suspected of crimes violations will be afforded all rights which are their due under the Constitution. Review by this Court in the pres-

ent case will restore the element of orderliness to the administration of criminal justice. Finally, the strong factual setting of the instant case makes it an appropriate one for this Court to utilize in defining the exact contours of its decision in *Escobedo* v. *Illinois* concerning the right to counsel during police interrogation.

POINT II

The United States Court of Appeals for the Third Circuit, in according the decision of *Escobedo* v. *Illinois* retroactive operation in a *habeas corpus* appeal, has decided a very important question of constitutional law which has not been determined by this court and in a manner which is in conflict with the decisions of other federal courts.

A. The United States Court of Appeals did, in fact, decide that the decision of *Escobedo* v. *Illinois* was to be given retroactive operation.

The United States Court of Appeals for the Third Circuit accorded the decision in the *Escobedo* case retroactive operation so as to upset the judgments of conviction in the case at bar. Although that court, in its opinion denying the State's petition for rehearing, stated that it did not "pass upon the issue of retroactivity," it still cannot be disputed that the court applied the *Escobedo* decision to convictions which had come final before *Escobedo* had been announced. The above analysis is in complete accord with this Court's definition of the word "final" as contained in *Linkletter* v. *Walker*, 381 U. S. 618 (1965):

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for Petition for Certiorari had elapsed before decision . . ." (85 Sup. Ct. at 1734, n5.)

Under the above definition, the court below could not have invalidated the judgments of conviction without at least impliedly ruling that *Escobedo* was to be applied retroactively. The fact that the above decision was retrospectively applied without discussion is of no consequence since this Court, itself, has previously applied new constitutional rules, without discussion, to cases which became final before rendition of the rule. (See *Linkletter* v. *Walker, supra,* 381 U. S. at 628 (n. 13).

Moreover, the Court of Appeals was in error in claiming that the issue of retractivity was not before the court. As aptly noted by Judge Forman in his concurring opinion, the date of exhaustion of the direct appeal remedies by the defendants (June 17, 1965), and the date of the *Escobedo* decision (June 22, 1964), were matters of record and therefore were validly before the court. (351 F. 2d at 442)

Thus, as can be seen by the foregoing discussion, there can be no question that the appellate court below had ruled, albeit impliedly, that the decision in *Escobedo* v. *Illinois* was to be given retroactive application.

B. Constitutional doctrines allow this Court a choice whether to apply *Escobedo* retroactively.

The early common law approach to retroactivity was based on the Platonic, metaphysical principle that the true law had an ideal and immutable existence. Under this view, the duty of the court was not to "pronounce a new law, but to maintain and expound the old one." I *Blackstone Commentaries*, 69 (1769). Thus, judges were thought to discover the law rather than create it. However, our courts have since adopted a more realistic approach to this question and have tended to regard the foregoing philosophy as a "splendid myth." *U. S. ex rel. Durocher* v. *La Vallee*, 330 F. 2d 303, 312 (2 Cir. 1964).

The case of *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1942) represents an initial departure from the Blackstonian view of retroactivity. The issue, in the above case, was what effect should be given to judgments which were based on a statute which since had been declared unconstitutional. The federal courts below proceeded on the theory that since the statute had been found to be unconstitutional it was never law and did not even confer any rights or impose any duties. In reversing, Chief Justice Hughes, speaking for a unanimous Court stated:

> "The actual existence of a statute, prior to such determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attentions of courts, state and federal, and it is manifest that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." 308 U. S. at 374.

The weight to be given a final judgment, even on a *habeas corpus* petition, is illustrated by the case of *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir.), *cert. denied* 314 U. S. 678 (1941). In the above case, the defendant was convicted in 1939 of criminal contempt. In reliance on this

Court's interpretation of the federal contempt statute, he entered a plea of guilty. In 1941, this Court overruled its prior decision defining the limits of the federal contempt statute, changing its interpretation so that the defendant could not have been convicted subsequent to the overruling decision. In ruling that *habeas corpus* could not be used to nullify what was a valid judgment at the time of its rendition, the court per Judge (later Chief Justice) Vinson stated in part:

> "These considerations [of the nature of the law and its administration] should guide the lawmakers and the lawappliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past, and if the latter, to what extent. And these considerations should be applicable to both sides of a potential litigation, civil or criminal, so that we may have our rules of the game as we go.
>
> We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The Nye case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. *It seems even sounder to say that the living should not be governed by their posterity for that, in turn,*

would be downright chaotic." Id. at 646-47. (Emphasis and insert added)

A similar approach was recently employed in *United States* v. *Sobell*, 314 F. 2d 314 (2 Cir.), *cert. denied* 374 U. S. 857 (1963) where the court held that an overruling decision of this Court should not be applied retroactively on a collateral attack via a *habeas corpus* petition so as to upset a previously valid judgment. The court stated in this regard:

> "There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause 'litigation in these criminal cases (to) be interminable' 332 U. S. at 182, 67 S. Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the inability of the Government to discharge the duty of protection which it owes to all its citizens." (314 F. 2d at 324.)

The court also took cognizance of the great difficulties inherent in retroactively applying new rules on a collateral attack as opposed to doing same on a direct appeal:

> "When a claim is raised upon direct appeal as this could have been, and is there sustained, a new trial can be had seasonably, when witnesses are still available and their recollections still fresh. In contrast, collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to

> direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts. When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment. (314 F. 2d at 325).

The question concerning the compulsory retroactivity of a new constitutional principle was definitively settled by this Court in *Linkletter* v. *Walker, supra,* where it was specifically held that:

> ". . . (W)e believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said 'We think the Federal Constitution has no voice upon the subject.'" (85 Sup. Ct. at 1737.)

This Court then went on to establish guide lines for determining whether a new constitutional rule should be given retroactive effect:

> "Once the premise is accepted that we are neither required to nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (85 Sup. Ct. at 1738.)

Therefore, in view of the foregoing, the *Escobedo* decision should not be retroactively applied unless it be explicitly found that the above factors favor such application.

C. The pertinent judical and social considerations militate against retroactivity.

1. The purpose of the Escobedo decision will not be achieved by giving it retroactive operation.

The holding of the *Escobedo* decision as apparently set forth by this Court was that a suspect should be permitted to consult with his attorney during the police interrogation before arrest. The reason for permitting him to have the "guiding hand of counsel," was that it "was essential to advise [him] of his rights in this delicate situation." 378 U. S. at 486. A suspect informed of these rights was thought to be less apt to give an ill-advised confession.

As seen by the foregoing, the purpose of *Escobedo* was to deter police interrogation of a suspect without counsel so as to prevent unwary self-incrimination. It is respectfully urged that this purpose will not be achieved by giving *Escobedo* retroative effect. That decision was an attempt to "sterilize the police ante-chamber," and to correct the conditions which invited coerced confessions and improvident self-incrimination. *In re Lopez*, 42 Cal. Rptr. 188, 398, P. 2d 380, 384 (1965); *State* v. *Johnson*, 43 N. J. 572, 588, 206 A. 2d 737 (1965); *Walden* v. *Pate*, —— F. 2d —— (7 Cir. 1965); 34 U. S. L. Week 2065 (July 27, 1965); *United States* v. *Pate*, 240 F. Supp. 237, 240 (N. D. Ill. 1915); *Commonwealth* v. *Negri*, —— Pa. ——, —— A. 2d —— 34 U. S. L. Week 2186 (Sup. Ct. Pa. October 12, 1965). It sought to deter future police conduct rather than to prevent behavior which had already been sealed by the past. Indeed, it is self-evident that "misconduct of the police has already occurred and will not be corrected by releasing the prisoners involved." *Linkletter* v. *Walker*, *supra*, 85 Sup. Ct. at 1741-42. The above view has been expressed by the Supreme Court of California in the following manner:

". . . . We believe that the United States Supreme Court in Escobedo sought primarily to prevent police tactics which, in the past, have spawned involuntary confessions. The court has concluded that presence of counsel would go far to eradicate such tactics. As a means to that end it held that, if the opportunity to procure such counsel had been denied, the confession or incriminating statement procured by the police should not be introduced into evidence. Thus the rule contemplated the prospective prevention of coercive practices—not the extirpation of such practices committed in the past." *In re Lopez*, 398 P. 2d at 383.

Similarly, the United States Court of Appeals for the Seventh Circuit held as follows:

"The purpose of the *Mapp* and *Escobedo* rules is the deterrence of abuses by law enforcement officers. Experience had shown that the only effective means of enforcing compliance with the Fourth Amendment's prohibition against illegal searches and seizures was to render all evidence thus obtained inadmissible, and in *Mapp* the Supreme Court took that step. *Escobedo* was likewise the culmination of long experience with cases involving defendants who had been held and gave confessions without assistance of counsel. The administration of justice suffered from the difficulties for the trier of fact and for courts of review of determining from the conflicting testimony of the interested parties whether a confession was or was not voluntary; and a condition existed where ignorance of constitutional rights and absence of counsel operated to the prejudice of persons in custody. In order to put an end to a system so fraught with potential abuses, the Supreme Court in *Escobedo* decided to remove the incentive to deny an ac-

cused the right to counsel by rendering inadmissible any confession obtained while such denial was in effect. It is because of the similarity of purposes that we, as the Supreme Court did with the *Mapp* rule in *Linkletter* v. *Walker*, hold that the rule of *Escobedo* does not apply retrospectively." *Walden* v. *Pate*, —— F. 2d —— (34 U. S. L. Week 2065.)

As seen by the foregoing, the purposes of the *Escobedo* decision would not be served by allowing final judgments of state courts to be reopened and collaterally attacked many years after their rendition.

2. *A confession excluded under the Escobedo rule is not inherently unreliable and therefore does not have a clear capacity for conviction of the innocent.*

Until the *Massiah* and *Escobedo* decisions, the state courts employed the traditional voluntary-involuntary test to determine whether a confession was properly admissible in evidence. *Culombe* v. *Connecticut*, 367 U. S. 568 (1961). Failure to advise a defendant of his right to an attorney and of his right against self-incrimination were merely factors to be considered in the "totality of circumstances" in determining whether a confession was involuntary. *Haynes* v. *Washington*, 373 U. S. 503, 516, 517 (1963). If a confession was found to be involuntarily given it was excluded for the reason, *inter alia*, that there is "likelihood that the confession is untrue." *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960); *Jackson* v. *Denno*, 378 U. S. 368, 385-86 (1964).

With the advent of *Escobedo*, this Court, for the first time, excluded a confession, although found to be voluntary, (378 U. S. at 484) on the sole ground that the petitioner should have been granted his request to see his attorney before making his statement. As stated previously, the confession in *Escobedo* was not excluded because it was in-

voluntary or unreliable, but was suppressed merely as an effective means of deterring and preventing a certain method of police conduct during interrogation.

Since the introduction of *Escobedo*-type confessions does not affect the guilt-determining process or have a clear capacity to convict the innocent, there will then be no necessity to needlessly overturn past convictions where the reliability of those convictions are not seriously impugned. Because the purpose of rule is, in essence, exclusionary as it was in *Mapp*, an analogy can be drawn to *Linkletter* where this Court denied retroactivity in part because the "integrity of the fact-finding process," and "the fairness of the trial," were not under attack. 85 Sup. Ct. at 1743. These observations are acutely applicable in the case at bar where the New Jersey Supreme Court, the United States District Court, and the United States Court of Appeals for the Third Circuit all found that the instant confessions were voluntary.

Chief Justice Traynor's remarks concerning the retroactivity of a new exclusionary rule of law (*Mapp*) are also particularly relevant in the *Escobedo* area:

> "The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of convicting the innocent. Such a risk attends any conviction ensuing from the witting use of perjured testimony, the suppression of evidence, an involuntary confession, the denial of an opportunity to present a defense, the denial of the right to counsel. A comparable risk arises upon a failure to provide an indigent defendant with a trial transcript necessary to perfect his appeal.
>
> "The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search or seizure is that he is clearly guilty. It is not the

purpose of the exclusionary rule to protect the guilty. Its purpose of deterring lawless law enforcement will be amply served in any state from now on by affording defendants an orderly procedure for challenging the admissibility of the evidence at or before trial and on appeal.

"Deterrence would be served but little more and at exorbitant cost by affording the weapon of collateral attack to those defendants who were convicted before the adoption of any exclusionary rule and hence had no way of challenging the admissibility of the evidence. To begin with, their cases are history, and they should not now be given the power to rewrite it. To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. There is a world of difference between a timely objection to evidence on the basis of the exclusionary rule and the uprooting of final judgments." Traynor, *Mapp, at Large in the Fifty States.* 1962 Duke L. J. 319, 340-41 (1962).

The Supreme Court of New Jersey considered the above factors in deciding that *Escobedo* should not be retroactively applied.

"Where the reliability of the guilt-determining process is seriously impugned, there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent considerations cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time, and subsequent judicial decisions cast no substantial doubts

upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal."

". . . Unlike Gideon, the rule of law which the defendants contend *Escobedo* announces does not raise substantial doubt as to the reliability of the determination of guilt. Therefore, we will not apply that rule to the prior convictions [here] . . .." *State* v. *Johnson, supra,* 43 N. J. at 585, 587.

Since the *Escobedo* decision does not cast doubt on the integrity of the fact finding process, our "deepest sentiments of justice," are not offended and therefore justice would not be served by giving it retroactive application.

3. The New Jersey courts justifiably relied on previous decisions of this Court in admitting the confessions in question into evidence.

At the time the instant case came before the New Jersey Supreme Court (*State* v. *La Pierre,* 39 N. J. 156 (1963)), the criteria employed for the admissibility of a defendant's confession in a state criminal trial was the voluntariness test. *Culombe* v. *Connecticut, supra.* There were previous decisions that failure to advise a defendant of his right to counsel and his right against self-incrimination were merely factors to be considered in determining the voluntariness of a particular confession. *Fikes* v. *Alabama,* 352 U. S. 191, 197 (1951); *Gallagos* v. *Nebraska,* 342 U. S. 55, 65 (1951). Moreover, this Court in two prior decisions specifically held that a confession was not, *ipso facto,* inadmissible merely because it was obtained after a suspect had been denied his request for assistance of counsel. *Crooker* v. *California,* 357 U. S. 433 (1958); *Cicenia* v. *La Gay,* 357 U. S. 504 (1958).

As established previously, since the *Escobedo* decision announced a new rule concerning the admissibility of con-

fessions in state criminal trials, the state courts of New Jersey as well as the United States District Court were perfectly justified in relying on the "voluntariness" test as well as the *Crooker* and *Cicenia* decisions in admitting the confessions. These courts should now not be held to an occult standard of clairvoyance of anticipating new judicial pronouncements which were not on the legal horizon when they rendered their decisions.

As with the *Wolf* doctrine prior to *Mapp*, the pre-*Escobedo* decisions are "operative fact[s] and . . . have consequences which cannot be justly ignored." 85 Sup. Ct. 1741. The many cases that were finally decided on the "voluntariness" doctrine "cannot be obliterated". Here, "prior determinations deemed to have finality and acted upon accordingly have been vested," *Ibid.*

It is therefore a significant consideration in passing upon the question of the retroactivity of *Escobedo* that the state courts placed legitimate reliance on the former law in this area. For this Court to now nullify past confessions by applying *Escobedo* retroactively, would be to hold that the state courts should have excluded certain confessions when at the time that these confessions were reviewed, this Court had clearly informed them that their exclusion was not constitutionally required.

4. Non-retroactivity of Escobedo is fully consistent with prior decisions of this Court.

The same factors which prompted this Court to hold *Mapp* non-retroactive in *Linkletter* are also present concerning the question of the retroactivity of *Escobedo*. As with *Mapp*, (1) The purpose of the *Escobedo* rule would not be served by its retroactive application, (2) The state courts justifiably relied on the pre-*Escobedo* "voluntariness" doctrine, (3) The *Escobedo* decision does not impugn the fairness of the trial, (4) The retroactive application of

Escobedo would have a catastrophic effect on the administration of justice. *Linkletter* v. *Walker, supra,* 85 Sup. Ct. at 1741-43. To the extent that the above circumstances are present in both situations, the *Linkletter* case must be considered authority against the retroactivity of *Escobedo.*

The *Escobedo* situation is far removed from those cases where new constitutional principles were applied retroactively. Retroactivity of new constitutional rules were granted only in instances where the alleged violation of the defendants' rights deprived them of a fair opportunity to litigate the question of their guilt or innocence.

In *Gideon* v. *Wainwright, supra,* this Court held that the Sixth Amendment granted to every defendant the right to counsel in all criminal trials. It was determined that without the assistance of counsel an innocent defendant could "face the danger of conviction because he does not know how to establish his innocence." 372 U. S. at 345. Because *Gideon* challenged the reliability of the judicial determination of guilt, it was applied retroactively. *U. S. ex rel. Durocher* v. *La Valle,* 330 F. 2d 303 (2nd Cir. 1964). Moreover, *Gideon* was a collateral attack, whereas *Escobedo* was a direct appeal.

In *Griffin* v. *Illinois,* 351 U. S. 12 (1956) this Court held that without a transcript a defendant could not obtain an adequate appellate review of the alleged errors at the trial. Without proper appellate review, a defendant's conviction could still be opened to serious doubt and therefore the *Griffin* rule was applied retroactively in *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U. S. 214 (1958).

Similarly, the coerced confession cases were held retroactive because since these confessions were potentially unreliable they could result in conviction of an innocent defendant. *Reck* v. *Pate,* 367 U. S. 433 (1961); *Fay* v. *Noia,*

372 391 (1961). Moreover, "the principle that a coerced confession is not admissible in a trial *pre-dated* the arrest as well as the original conviction in each of these cases." *Linkletter* v. *Walker, supra,* 85 Sup. Ct. at 1742. (Emphasis supplied.) In view of the foregoing, the non-retroactive application of *Escobedo* would be fully consistent with the logic and rationale of the apposite cases in this area.

5. The burdensome effect of retroactivity would severely impair the administration of justice.

Requiring both the state and federal courts to entertain and review the pertinent claims of all pre-*Escobedo* prisoners would severely disrupt the effectiveness of the judicial system. Initially, there would have to be collateral proceedings to determine whether certain confessions would be excluded. If these confessions were excluded, new trials would be afforded to defendants who have been since convicted. Prisoners who seek the benefit of the new rules would then have certain advantages they would not have had if the new rules were announced at the time of original trial. In all probabilities, witnesses available at the time of the original trial would not be available at the re-trial, or if available their memories would now be dimmed. Because of these circumstances, many prisoners would be set free because of an infirmity which does not affect the veracity of their former convictions. "To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Linkletter* v. *Walker, supra,* 85 Sup. Ct. at 1742.

Since all the state courts relied on the pre-*Escobedo* "voluntariness" doctrine, then consequently, all would be affected by a ruling in favor of retroactivity. The new collateral hearings which would be precipitated as a consequence of the retroactivity ruling would greatly increase

the presently congested court calendars and create an even greater backlog of criminal cases than exists today. The same result would also be produced to a great extent in the federal courts by means of review of federal convictions in the form of *habeas corpus* petitions. The above conditions would of necessity have the effect of postponing and delaying the disposition of many pending criminal trial and appeals.

Also, society has an interest in preventing a flood of relitigation. *State* v. *Johnson, supra*, 43 N. J. at 583-584 discusses this proposition in the following manner:

> "Furthermore, retroactive application of a new rule of law undermines the authoritative nature of final judicial decision. Society reasonably expects that when a man is convicted of a crime by a method not considered unfair according to the rules of law then in effect, that conviction will stand. Therefore, unless some countervailing considerations of the deepest sentiments of justice compel otherwise, a new rule of criminal law should not be applied retroactively."

The unlimited retroactivity of *Escobedo* would also have the effect of impairing the free development of constitutional law in the states courts. Although the federal courts prescribe minimum standards in certain areas of constitutional law, the state courts are free to apply more stringent standards if they so desire. *Ker* v. *California*, 374 U. S. 23 (1963). However, these courts would be recitent to apply new constitutional principles for fear that they would be given unlimited retroactivity and would result in the wholesale release of many prisoners. This would stultify the evolution of law in an area which requires revision due to the rapidly changing social conditions and attitudes of our period.

D. There is a conflict among the several United States Courts of Appeals and many of the highest state tribunals concerning the retroactivity of *Escobedo* and the great majority of these courts have denied retroactivity.

In addition to the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Ninth Circuit in the case of *Wright* v. *Dickson*, 336 F. 2d 878 (9 Cir. 1964) indicated that it would apply *Escobedo* retroactively. Relying upon that court's decision, the United States District Court for the District of Nebraska, specifically held that *Escobedo* was to be applied retrospectively (*Fugate* v. *Ellenson*, 237 F. Supp. 44 (D. Neb. 1964), but this decision was subsequently held in an abeyance pending review of that question by the state courts of Nebraska. *Ellenson* v. *Fugate*, 346 F. 2d 151 (8 Cir. 1965). See also *Golaza Cruz* v. *Delgado*, 233 F. Supp. 944 (D. Puerto Rico 1964), where *Escobedo* was applied retroactively without discussion on a *habeas corpus* petition.

To the contrary, are decisions by the United States Court of Appeals for the Seventh Circuit (*Walden* v. *Pate, supra*) and the United States District Court for the Northern District of Illinois (*United States ex rel. Conroy* v. *Pate*, 240 F. Supp. 237 (N. D. Ill. 1965) which denied retroactivity. See also *Timmons* v. *Payton*, 240 F. Supp. 749 (E. D. Va. 1965) where it was held that if no objection was imposed to the introduction of the confession it could now not be raised as an issue in post-conviction proceedings. *But see* the dissenting opinion of Chief Judge Soboloff in *Davis* v. *North Carolina*, 339 F. 2d 770, 787 (4 Cir. 1964), where he stated that *Escobedo* was to be accorded retroactivity.

Several of the state tribunals have ruled against retroactivity. *In re Lopez, supra* (California); *Ruark* v. *People*, —— Col. ——, —— P. 2d —— (34 U. S. L. Week 2213 Sup. Ct. Col. October 26, 1965); *People* v. *Hovnanian*, 22

A. D. 2d 686, 252 N. Y. S. 2d 241 (1964); modified in *People* v. *Huntley*, 15 N. Y. 2d 72, 255 N. Y. S. 2d 283 (1965); *Clark* v. *State*, —— Fla. ——, 175 So. 2d 80 (District App. 1965). It is also of importance to note that two of the three state jurisdictions within the province of the Third Circuit have differed with that court and denied *Escobedo* any effect in post-conviction proceedings. *State* v. *Johnson*, *supra*; *Thornton* v. *Yeager*, —— N. J. ——, —— A. 2d—— (1965); *Commonwealth* v. *Negri*, *supra*, —— Pa. ——, —— A. 2d —— (1965).

The uncertainty in this area has also bred the highly paradoxical situation where there are two opposing decisions concerning the issue at bar in the United States District Court for the District of New Jersey. In one instance, the District Court held that the *Escobedo* and *Russo* decisions were not retroactive (*Wade* v. *Yeager*, —— F. Supp. ——, 88 N. J. L. J. 599 (September 16, 1965), opinion by Judge Wortendyke filed August 27, 1965) and in another case a prisoner obtained a writ of *habeas corpus* where the trial judge applied *Escobedo* to overturn the prisoner's conviction in a post-conviction proceeding (*Holley* v. *Yeager* opinion filed by Judge Meaney on June 7, 1965). Thus, as this confused situation presently exists, a defendant who is denied relief in a particular state court may simply "walk across the street" and obtain the result he wishes from the United States District Court sitting in that state. Also, a prisoner who was convicted in one federal judicial circuit and who later pleads *Escobedo* in a post-conviction hearing may go free, whereas another who relies on the same case in another circuit may still remain incarcerated.

E. The issue of the retroactivity of *Escobedo* is one of great importance and requires prompt adjudication by this court.

Perhaps the best statement that can be given in support of the petitioner's request for *certiorari* are the remarks of the appellate court below where it asserted that "[t]he issues involved in the instant case are of such importance that they should be put before the reviewing Tribunal as promptly as possible." 351 F. 2d at 440. Here, we have an explicit plea by a United States Court of Appeals that the issue at bar should be definitively settled by this Court "as promptly as possible."

As illustrated previously, the courts are groping for answers in a nascent, faintly-illuminated area of the law. For these reasons, they have taken different paths as to how the *Escobedo* case should be implemented. This has created the anomalous situation where a prisoner who is denied relief in the state courts may simply shop for a more favorable disposition in the federal courts. If this unfortunate result were allowed to remain, it would breed disrespect for the law in the minds of the public who reasonably expect that criminal laws will be enforced and administered in a rational and congruous manner.

As seen by the above, the issue of retroactivity requires a prompt, definitive decision by this Court. Postponement of a determination on this question to a future date invites more uncertainty and confusion in a new and nebulous area of law whose contours are still ill-defined. Furthermore, if this Court does defer review of this question and subsequently decides against retroactivity, then many convicted criminals may be needlessly set free in the interim. This could then be viewed as "geographical" discrimination to those prisoners who remained incarcerated because they had the unfortunate chance of being con-

victed within a jurisdiction or federal circuit whose courts have denied retroactivity.

This court should not decline review of the instant question merely because the appellate court below stated that it did not decide the question of retroactivity. As established previously, it is beyond dispute that the *Escobedo* decision was retroactively applied by the court below on a *habeas corpus* appeal to upset the conviction of the instant defendants. To refuse review of the case at bar and allow the writ of *habeas corpus* to stand would be tantamount to an implied concurrence by this Court in the result that *Escobedo* can be used to collaterally attack past convictions. This action undoubtedly will be relied upon as precedent in future *habeas corpus* applications where *Escobedo* is employed to as collaterally attack former convictions.

Similarly, if this Court eventually rules against retroactivity then this would be highly discriminatory to those defendants who happened to have the question of retroactivity explicitly passed upon in their appeals and thus could not reap the unexpected benefit of an implied ruling of retroactivity as did the instant defendants. This arbitrary result would be giving form ascendancy over substance.

This Court, after announcing new and important principles of constitutional criminal law, has granted prompt *certiorari* to determine whether these newly rendered rules should be retroactively applied. This tribunal agreed to review the retroactivity of the *Mapp* decision when it granted *certiorari* three years after *Mapp in Linkletter* v. *Walker*, 377 U. S. 930 (1964). In *Griffin* v. *California*, 380 U. S. 609 (decided April 28, 1965) it was held that it was improper to comment in a state criminal proceeding concerning the accused's failure to testify. Approximately one month later, this Court granted *certiorari* to review the "question of the retroactivity of the doctrine announced

in *Griffin v. California*"; *Tehan* v. *Shott,* 381 U. S. 923 (*certiorari* granted May 24, 1965). Since the holding in *Ecsobedo* is not as narrow and well defined as those of *Mapp* and *Griffin* it is even more urgent that the question of its retroactivity be settled as quickly as possible.

It has been stated by this Court that its discretion of *certiorari* will be exercised where the circumstances of the case involve "the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeals, or between Courts of Appeals and the Courts of a State, or some matter effecting the interest of this nation in its internal or external relations. . . ." *Forsyth* v. *Hammond,* 166 U. S. 506, 514-15 (1896). It is respectfully submitted that the case at bar presents precisely such circumstances. The issues involved herein are of such importance that they ultimately must be decided by this Court and an immediate answer to the myriad of pressing questions which are arising from the courts of the fifty states will do much to alleviate the existing chaotic conditions in a newly created, but highly important, area of criminal law.

CONCLUSION

For the reasons discussed above, it is respectfully urged that *certiorari* should issue to review the decision of the court below.

Respectfully submitted,

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Of Counsel and on the Petition.

APPENDIX

Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)

UNITED STATES OF AMERICA, EX REL. ANTHONY RUSSO,

Appellant,

vs.

THE STATE OF NEW JERSEY and the Principal Keeper of the State Prison at Trenton, New Jersey.

UNITED STATES OF AMERICA EX REL. FRANK BISIGNANO,

Appellant,

vs.

THE STATE OF NEW JERSEY and the Principal Keeper of the State Prison at Trenton, New Jersey.

Nos. 14833, 14869.

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

Argued Nov. 12, 1964.

Decided May 20, 1965.

Rehearing Denied Oct. 13, 1965.

Before BIGGS, Chief Judge, and FORMAN and SMITH, Circuit Judges.

BIGGS, Chief Judge,

Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)

These are appeals from denials of writs of habeas corpus by the court below. The petitioners-appellants, Russo and Bisignano, with a co-defendant, LaPierre, were indicted and convicted of murdering a policeman in Newark, New Jersey. The murder was committed while Russo and Bisignano were engaged in the commission of the felony of attempting to rob a tavern. The convictions were affirmed by the Supreme Court of New Jersey, State v. LaPierre, 39 N. J. 156, 188 A. 2d 10 (1963). Bisignano attempted to have his conviction reviewed by the United States Supreme Court, but certiorari was refused. Bisignano v. New Jersey, 374 U. S. 852, 83 S. Ct. 1920, 10 L. Ed. 2d 1073 (1963).

The operative facts are as follows. At approximately 11:15 on the night of March 15, 1961, Russo and Bisignano, with La Pierre, attempted to "holdup" a tavern in Newark, New Jersey. Bisignano and Russo entered the tavern; Russo, brandishing a revolver, announced their purpose. Joseph Hagel, an off-duty policeman, was present and drew a pistol in an attempt to prevent the robbery. Shots were exchanged; Hagel was mortally wounded, while Russo was struck by a bullet in his right arm. Russo, LaPierre and Bisignano then fled from the tavern. LaPierre was quickly apprehended by Newark police officers less than three blocks from the scene of the crime. Soon thereafter, Russo was seized approximately five blocks from the tavern. Bisignano was arrested the following morning.

When LaPierre and Russo were placed under arrest, they were first taken back to the tavern. None of the four eye witnesses to the shooting was able to identify LaPierre since, as it later developed, LaPierre had been stationed outside of the tavern in the "getaway" car. Russo was identified immediately as possibly being one of the two men

who had attempted the robbery, although none of the four witnesses positively identified Russo.

LaPierre was then taken to police headquarters while Russo was taken to a hospital for treatment of his wounded right arm. He was admitted to the hospital in the early morning of March 16. After emergency treatment was rendered to Russo, he was questioned for a short time by four members of the Newark police force, but he refused to admit complicity in the crime. Russo also refused to permit an operation to excise the bullet from his arm. However, the pain from the bullet became excruciating and, on March 17, he submitted to an operation. He was accompanied to the operating room by a police officer. Upon return to his hospital bed from the operating room, Russo, for the first time, admitted his participation in the attempted hold up under the questioning of two police detectives. After the operation, Russo was detained at the hospital until March 24, at which time he was released from the hospital in the custody of the police. It is undisputed that during Russo's entire detention in the hospital he was under constant police guard. In addition, he was shackled to the bed to prevent, we assume, any possibility of escape. Interrogation at the hospital was sporadic and it appears that no sustained interrogation was made between the oral admissions on the 17th and the his release from the hospital on the 24th.

Upon Russo's release from the hospital he was taken directly to an interrogation room at police headquarters. He was questioned there for approximately two hours before he confessed orally. Russo was then detained in the interrogation room for an additional three hours so that his oral statement could be reduced to writing and signed by him.

Russo was not taken to a magistrate for a preliminary hearing until March 28. At that time, Russo's hearing was postponed until April 4. No explanation appears in the record as to the reason for the postponement,[1] but it is relevant to note that the Grand Jury returned an indictment on March 30.

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[1] The New Jersey Crim. Prac. R. 3:2-3 provides in pertinent part:

"(a) Appearance. * * * A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate * * *.

"(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. * * *

"(c) Preliminary Examination. * * * If the defendant does not waive [preliminary] examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause, otherwise, the magistrate shall discharge him * * *. The magistrate shall admit the defendant to bail as provided by these rules."

Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)

At the trial in the Essex County Court, Law Division, held at Newark, New Jersey, there was psychiatric testimony to the effect that Russo was within "the lower reaches of the average range of intelligence." There was also evidence that Russo "was markedly deficient with respect to his capacity for verbal abstraction, the capacity to think abstractly, and the capacity to evaluate external reality with any validity, with any substance, with any genuine understanding of what is going on around him * * * that his social judgment and perceptual alertness were massively impaired with respect to what the norm might be."

Bisignano was arrested on the morning of March 16 at approximately 10:30 and was taken immediately to a soundproof interrogation room. He was questioned for about two and a half hours by at least nine different policemen working in relays of four and five. During this interrogation period LaPierre was seated outside of the interrogation room. At frequent intervals, policemen questioning LaPierre would check his answers with Bisignano's answers and Bisignano's answers were checked against LaPierre's answers. In addition, the answers of both were being checked against a statement given to the police by Veronica Szmatowicz, who was Russo's fiancee, who had been arrested with Bisignano that morning. As a result of this cross-checking of stories, it is difficult to determine accurately how many police officers actually participated in the questioning of Bisignano.

Bisignano finally admitted orally his complicity in the crime at about 1:30 P.M. There was then a break in the interrogation process of about two hours. Then, from approximately 3:30 P.M. until approximately 6:30 P.M., Bisignano's oral statement was reduced to writing and signed

by him. He was not permitted to see any visitors until after his written statement was signed.

Bisignano was not taken to a magistrate until March 20, at which time his hearing was postponed to March 28. The hearing was again postponed until April 4, at which time he had already been indicted. See note 1, supra.

On the day following their respective confessions, Russo and Bisignano were taken to the tavern and asked to re-enact their crime, which they did, thereby further incriminating themselves.

The court below made an affirmative finding, well-supported and uncontroverted by the record, that neither Russo nor Bisignano were at any time prior to the signing of their confessions informed that they had a right to remain silent, that they had a right to counsel and that anything they said could be used against them. It appears that it was not until April 4 that the two were informed of their rights.

It should be noted further that Bisignano rested on the transcript of the state court trial at his federal habeas corpus hearing. Russo offered some additional evidence in the way of new evidence in addition to his reliance on the state trial transcript.

I. Illegal Detention

Russo and Bisignano assert that any confession made during an illegal detention is inadmissible at trial. There is no doubt that the detentions were illegal under New Jersey law, see note 1, supra, and that the Newark police force disregarded the rights secured to an arrested person under the law of New Jersey. The petitioners-appellants press the point that the circumstances under which their

confessions were obtained transgressed the rights secured to them by the Fourteenth Amendment and therefore were inadmissible in evidence. While it is the rule in federal prosecutions that confessions obtained in these circumstances must be suppressed, Mallory v. United States, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943), this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecutions and does not rise to the dignity of a constitutional prohibition. Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Stroble v. State of California, 343 U. S. 181, 197, 72 S. Ct. 599, 96 L. Ed. 872 (1952); Gallegos v. State of Nebraska, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951). It follows that this defense asserted by the appellants must fall.

II. Physical Coercion

Both Russo and Bisignano testified that the confessions were the product of physical beatings and punishment, accompanied by threats of more physical harm. Russo also testified that while at the hospital he was subjected to physical punishment and torturous treatment by the police. Bisignano testified that the police threatened to arrest his wife if he did not confess. The evidence of the petitioners was corroborated to some degree by the statements of various witnesses who testified that they bruises or heard complaints by Russo and Bisignano of police brutality. The police denied all accusations of physical abuse, threats or promises and, in fact, testified that both petitioners cooperated with them in solving the case. The State produced additional testimony to rebut the inferences of physical abuse. It is clear that there was a conflict in the evidence

and that the issue was solely one of credibility. Under these circumstances, we must accept the findings of fact made by the triers of fact, here the New Jersey state court and the court below. Both found no physical coercion and we are bound by that finding. Haynes v. State of Washington, 373 U. S. 503, 515, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953); Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); United States ex. rel. Johnson v. Yeager, 327 F. 2d 311 (3 Cir.), cert. denied, New Jersey v. Godfrey, 377 U. S. 977, 984, 84 S. Ct. 1882, 12 L. Ed. 2d 745 (1964); United States ex rel. Smith v. State of New Jersey, 323 F. 2d 146 (3 Cir. 1963), cert. denied, 377 U. S. 1000, 84 S. Ct. 1927, 12 L. Ed. 2d 1049 (1964).

III. Mental Overbearing

Both petitioners also claim that the length of their detentions, when combined particularly in the case of Russo with his mental condition, rendered the confessions coerced in that they were the products of overborne minds. There is no "litmus-paper test" that a court can look to or apply in order to determine whether a statement, amounting to a confession, was made voluntarily, *i.e.*, that it was the product of a free will. Rather, we must look to all the relevant factors and all must be considered and weighed together. Culombe v. Connecticut, 367 U. S. 568, 601, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). See Lynumn v. State of Illinois, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). In the case of Bisignano the factors as they appear on the record show that the questioning was of rather short duration, although conducted in the absence of counsel and with no warning of his constitutional safeguards. However, we

think that within the decisions of this circuit, there is no question that the confession was not coerced. See United States ex rel. Johnson v. Yeager, supra; United States ex rel. Smith v. State of New Jersey, 323 F. 2d 146 (3 Cir. 1963), cert. denied, 377 U. S. 1000, 84 S. Ct. 1927, 12 L. Ed. 2d 1049 (1964); United States ex rel. Smith v. State of New Jersey, 322 F. 2d 810 (3 Cir. 1963), cert. denied, 376 U. S. 928, 84 S. Ct. 678, 11 L. Ed. 2d 623 (1964).

As to Russo, were we confronted only with the police activity at the police station we could conclude without difficulty that Russo's statement there made, the equivalent of a confession, was voluntary. But we have more. There was the questioning of Russo at the hospital, the crucial portion of which was conducted by the two police detectives shortly after the operation had been performed and when he was shackled by his ankle to his bed. Russo admitted, as stated previously, his active participation in the attempted hold up. Interrogation of Russo under the circumstances seems repugnant to concepts of fairness. In addition there is the psychiatric testimony tending to show that Russo was susceptible to suggestions and unable to relate his present actions to future consequences. There is the additional problem that even when he was questioned at the police station Russo was in a weakened condition and his arm was still in a sling. These factors, when combined with the lack of any warning to Russo as to the constitutional safeguards to which he was entitled and his illegal detention could create an inference that the confession was the product of an overborne mind.

On the other hand, however, it is possible to draw the inference that Russo had declined to permit the removal of the bullet from his arm because of his fear that ballistics

tests would prove that bullet had been fired from the revolver of the police officer who was killed at the scene of the crime, thus implicating Russo in the attempted robbery and murder. The further inference can be drawn that after the bullet had been removed Russo gave up all hope of extricating himself from the situation in which he found himself and confessed the attempted robbery. This inference is strengthened by the fact that the confession occurred almost immediately upon Russo's return from the operating room.

On balance, we conclude that this inference outweighs any inference of coercion on these facts.

IV. Denial of Right to Counsel

Both Russo and Bisignano argue that the failure of the police to warn them of their constitutional right to remain silent, of their constitutional right to counsel and to inform them that anything that they said might be held against them requires that their oral and written statements be excluded and hence necessitates the reversal of the judgments of conviction.[2]

In respect to coerced confessions, the Supreme Court, in recent years, has taken the position that such confessions are excluded not only because they may be unreliable but also because they offend the concept of the accusatory system, an essential part of the fundamental legal philosophy under which this nation was founded. See Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); see also 112 U. Pa. L. Rev. 394 (1964). "Our decisions under that Amendment [the Fourteenth] have

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[2] Cf. Slovenko, Representation for Indigent Defendants, 33 Tul. L. Rev. 363, 371 (1959).

made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitional system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Rogers v. Richmond, 365 U. S. 534, 540-541, 81 S. Ct. 735, 739, 5 L. Ed. 2d 760 (1961). Reliance on the accusatory system has introduced into the opinions of the Supreme Court additional safeguards to protect a defendant against the introduction into evidence of possibly coerced statements. See Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). These same concepts have compelled a greater reliance on the presence or absence of counsel as a factor in determining the voluntariness of a confession. Haynes v. State of Washington, 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Lynumn v. State of Illinois, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963); Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Spano v. People of State of New York, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959); Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948 (1954). See generally, Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings & Legal-Policy Observations, 48 Minn. L. Rev. 1 (1963); Enker & Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47 (1964); Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L. J. 1000 (1954). In Spano, supra, four Justices would have re-

versed the conviction solely because of the absence of the defendant's counsel at a post-indictment interrogation.

Aside from the expansion of the importance of the aid of counsel for the accused in determining the voluntariness of a confession, the Supreme Court has expanded Sixth Amendment protection[3] as an independent ground for exclusion of a confession or for granting a new trial. In Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Supreme Court held that a criminal defendant in a state court is entitled to the same right to counsel as a criminal defendant in a court of the United States. Compare Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

The effect of Gideon has been to expand the right to counsel and there has also been a widening of the concept of the stage or stages when that right attaches. We conclude that it is now the law that the right to counsel is present at every critical stage of the proceedings. It has definitely been settled that the right attaches at arraignment where, under state law, that stage is critical as frequently it must be deemed to be. White v. State of Maryland, 373 U. S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963); Hamilton v. State of Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); see Pointer v. State of Texas, 380 U. S. 40, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

More recently, in 1964 the Supreme Court, in Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Massiah v. United States, 377 U. S. 201, 84 S. Ct.

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[3] "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Council for his defence."

1199, 12 L. Ed. 2d [illegible],[4] has held that, under certain circumstances, the right to counsel attaches at the interrogation level. These cases hold that where the right attaches any confession obtained in the absence of counsel must be suppressed independent of any issue of the voluntariness of the confession. In Massiah, the petitioner had already been indicted and was free on bail. Massiah's alleged partner in crime agreed to cooperate with the police. By prearrangement with the police, a radio transmitter was installed in the petitioner's automobile, thereby enabling the police to hear conversations conducted in the car. The partner talked with Massiah in the car and obtained incriminating statements from him. The Supreme Court held that the statements were inadmissible since the police practice offended Massiah's right under the Sixth Amendment to the protection of counsel, relying on the concurring opinions in Spano, supra. The majority opinion treated this surreptitious questioning as an interrogation by the police and held that at this point in the proceedings, *i.e.*, post-indictment, Massiah had the right to the assistance of counsel.

In Escobedo, the Supreme Court extended the right to counsel to a person who had not been indicted or arraigned, but who had been taken into custody and interrogated by the police at the police station. Escobedo had an attorney and had conferred with him a few days prior to his interrogation at the police station. During his detention by the police Escobedo's attorney was present in the building and attempted to speak to his client but was denied access to him by the police. Escobedo also requested per-

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[4] It is to be noted that the court below, when it filed its opinion in the instant cases, did not have the benefit of these two far-reaching decisions of the Supreme Court.

mission to see his counsel, but the police denied that request. The Supreme Court stated: "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment.' * * * and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U. S. at 490-491, 84 S. Ct. at 1765. The Court again stated its holding at 492, 84 S. Ct. at 1766: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

The concern of the Supreme Court in Escobedo was to determine the point at which the right to counsel attached. Not every police interrogation requires the presence of counsel, but when the focus of the investigation shifts from inquiries of a general nature to the investigation of the acts of a particular suspect counsel for the individual subject to the interrogation must be present unless counsel be intelligently waived by the suspect. United States v. Konigsberg, 336 F. 2d 844, 853 (3 Cir.), cert. denied; 379 U. S. 933, 85 S. Ct. 334, 13 L. Ed. 2d 344 (1964). At the time the

confessions of Bisignano and Russo were obtained the focus had shifted. When Bisignano confessed the police already had the statement of LaPierre which implicated both Bisignano and Russo. At the time Russo confessed the police had the confessions of both LaPierre and Bisignano. In addition, when Bisignano and LaPierre confessed the police also had the statement of Veronica Szematowicz which incriminated Bisignano and Russo. Additionally, as to Russo, the police were in possession of a liquor bottle and its carton, both of which contained Russo's fingerprints. The bottle and the container were found in the "getaway" car parked in front of the tavern. If this were not enough, there is also the fact that both Bisignano and Russo fitted the general description given to the police by eye witnesses and Russo had been identified as possibly being one of the two holdup men. We hold on these facts that the focus had shifted from a general inquiry into an unsolved crime to an accusatory process involving Bisignano and Russo.

Nor can it be contended successfully that the questioning process here did not lend itself "to eliciting incriminating statements."

There is, however, a factual distinction between the cases at bar and Escobedo. In Escobedo, there had been a request for counsel; here there was none. Is this factual distinction a tenable ground for distinguishing Escobedo from the cases at bar?

Certainly it is untenable to ground a distinction on the fact that Escobedo had already hired his own attorney while Bisignano and Russo would have required appointed counsel. Such a distinction smacks of denial of equal pro-

tection once it is determined that there is a right to counsel at this stage of the proceedings. Cf. Douglas v. People of State of California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

The distinction, if there be one, must rest on the absence of a request by Bisignano and Russo to have counsel present during the interrogation. But both reason and precedent dictate against such a distinction.

At every other stage of the proceedings at which a right to counsel attaches, the right does not depend on a request for counsel nor can it be presumed that failure to request counsel constitutes a waiver of that right. Carnley v. Cochran, 369 U. S. 506, 513, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); Uveges v. Com. of Pennsylvania, 335 U. S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948); Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); see also Commonwealth ex rel. Remeriez v. Maroney, 415 Pa. 534, 204 A. 2d 446 (1964); Commonwealth ex rel. Goodfellow v. Rundle, 415 Pa. 528, 204 A. 2d 446 (1964); Commonwealth ex rel. O'Lock v. Rundle, 415 Pa. 515, 204 A. 2d 439 (1964).

We can perceive no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other. The test of waiver is the same, or should be, no matter what stage of the proceedings is at issue, so long as the right has attached. In Escobedo the Supreme Court recognizes this principle: "The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial. See Johnson v. Zerbst, 304 U. S. 458 [58 S. Ct. 1019, 82 L. Ed. 1461]. But no knowing and intelligent waiver of

any constitutional right can be said to have occurred under the circumstances of this case." 378 U. S. at 490, n. 14, 84 S. Ct. at 1765. This language of the Court compels the conclusion stated by Mr. Justice White in his dissenting opinion that the only logical result is to require an intelligent waiver: "Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel * * * or has asked to consult with counsel in the course of interrogation. * * * At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel." 378 U. S. at 495, 84 S. Ct. at 1767.

No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver. In reviewing the facts of Escobedo, it is apparent that Escobedo was well informed of his constitutional rights since some days previously he had conferred with counsel and it must be assumed, as the Supreme Court did assume, that counsel had informed Escobedo of his right to remain silent and the effect any statement that he made might have. Yet the Supreme Court held that such prior instructions were inadequate when Escobeo was faced with the incriminating statements of his alleged partner in crime. The Supreme Court held that at that very moment when he was confronted with these statements, he was entitled to the guiding hand of counsel.

The request by Escobedo to consult with his attorney is in and of itself evidence that he was aware of his constitutional rights. Thus, it would seem that to suppress a confession of one knowledgeable of his rights but who has nonetheless confessed and to admit into evidence a confession of one who might be unaware of his rights at the time of his confession would be sophistry. The view that we have expressed here has been well stated by the California Supreme Court: "To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." People v. Dorado, 42 Cal. Rptr. 169, 178, 398 P. 2d 361, 370 (1965), cert. denied, 381 U. S. 937, 85 S. Ct. 1765, 14 L. Ed. 2d 702 (1965). Professors Kamisar and Choper have stated this same rationale in slightly different language: "If the right is deemed sufficiently important to be a due process requirement, why it is not sufficiently important to be made available to the unwary, ignorant and inexperienced as well as to the informed, sophisticated, and professional?" Kamisar & Choper, supra, at 61.[5] "Failure to insist on an intelligent waiver of the right to remain silent inevitably discriminates against the ignorant and inexperienced who may answer questions without any apparent coercion simply because they believe that the police have the authority or power to make them." 78 Harv. L. Rev. 177, 217, 220 (1964). See also Enker & Elsen, supra at 77; 107 U. Pa. L. Rev. 286, 289 (1959).

We find ample judicial authority supporting the view that the right to counsel at the interrogation stage does

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[5] See also Lockhart, Kamisar & Choper, Constitutional Law, 1964 Supp. at p. 39, notes 4-6; Note 19 Rutgers L. Rev. 111 (1964); 53 Cal. L. Rev. 337, 359-61 (1965).

not depend on a request by the person interrogated, although there are decisions to the contrary. In addition to the California decision, Dorado, quoted supra, the Supreme Court of Oregon in a case similar to the case at bar has held that the failure to warn the accused of his right to remain silent requires that the confession be suppressed. State v. Neely, 395 P. 2d 557 (1964). See also Commonwealth v. McCarthy, Mass., 200 N. E. 2d 264 (1964); State v. Dufour, 206 A. 2d 82 (R. I. 1965); State v. Hall, 397 P. 2d 261, 268 (Idaho 1964) (opinion of McQuade, J.); Campbell v. State, 384 S. W. 2d 4 (Tenn. 1964). The appellate courts of Illinois, People v. Hartgraves, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), cert. denied, 85 S. Ct. 1104 (1965); Maryland, Sturgis v. State, 235 Md. 343, 201 A. 2d 681 (1964),[6] and New Jersey, State v. Scanlon, 84 N. J. Super. 427, 202 A. 2d 448 (1964),[7] have, however, held that a request is

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[6] The rule in Maryland is now well-settled. Davis v. State, 236 Md. 389, 204 A. 2d 76 (1964); Henn v. State, 236 Md. 615, 203 A. 2d 899 (1964); Green v. State, 236 Md. 334, 203 A. 2d 870 (1964); Parker v. Warden, 236 Md. 236, 203 A. 2d 418 (1964); Hyde v. Warden, 235 Md. 641, 202 A. 2d 382 (1964); Mefford v. State, 235 Md. 497, 201 A. 2d 824 (1964); Bichell v. State, 235 Md. 395, 201 A. 2d 808 (1964).

[7] The New Jersey Supreme Court has indicated that it will follow this result. State v. Smith, 43 N. J. 67, 202 A. 2d 669 (1964), cert. denied, 379 U. S. 1005; 85 S. Ct. 731, 13 L. Ed. 2d 706 (1965); State v. Vigliano, 43 N. J. 44, 202 A. 2d 657 (1964). See also State v. Johnson, 43 N. J. 572, 206 A. 2d 737 (1965).

Apparently, the Supreme Courts of Virginia, Wansley v. Commonwealth, 205 Va. 412, 137 S. E. 2d 865 (1964), cert. denied, 380 U. S. 922, 85 S. Ct. 920, 13 L. Ed. 2d 806 (1965) and Ohio, McQueen v. Maxwell, 177 Ohio St. 30, 201 N. E. 2d 701 (1964), will also require a request for counsel. Ohio adhered to this position in State v. McLeod, 1 Ohio St. 2d 60, 203 N. E. 2d 349 (1964), a case which was remanded back to it by the Supreme Court, 378 U. S. 582, 84 S. Ct. 1922, 12 L. Ed. 2d 1037 (1964), for reconsideration in light of Massiah.

necessary for the Escobedo rationale to come into play. Accord, People v. Gunner, 15 N. Y. 2d 226, 257 N. Y. S. 2d 924, 205 N. E. 2d 852 (1965); Bean v. State, 398 P. 2d 251 (Nev. 1965); Browne v. State, 24 Wis. 2d 491, 129 N. W. 2d 175, 131 N. W. 2d 169 (1964); cert. denied, 379 U. S. 1004, 85 S. Ct. 730, 13 L. Ed. 2d 706 (1965). The Supreme Court of Pennsylvania, in three recent cases, Commonwealth ex rel. Linde v. Maroney, 416 Pa. 331, 206 A. 2d 288 (1965); Commonwealth ex rel. Storch v. Maroney, 416 Pa. 55, 104 A. 2d 263 (1964) and Commonwealth v. Coyle, 415 Pa. 379, 203 A. 2d 782 (1964), has also taken the view that a request is necessary. However, in the Linde decision, supra, Justice Roberts wrote a separate concurring opinion in which he stated: "While I join in the majority opinion and conclusion, I am not entirely untroubled by the fact that, at least in part, our test turns on a request for counsel. There are some logical problems in making it do so. * * * Among other things, I am somewhat bothered by the fact that a 'request test' may protect only those who know enough to request counsel. Those most likely to know that they should request counsel are persons often in criminal trouble before, perhaps the habitual criminal. Those who are having their first encounter with the law may be much less likely to have either the knowledge or presence of mind to request counsel." However, Justice Roberts was willing "for the present" to concur due to the Supreme Court's frequent references in Escobedo to the " 'circumstances' of that case." Justice Roberts concluded his concurring opinion by noting, "No doubt, we shall have further guidance from the Supreme Court of the United States on this subject. In any event, if the law enforcement officers of this Commonwealth unfailingly advise one upon whom the spotlight of accusation has swung that he has a

right to counsel, then the stress in this area will be substantially lessened." 416 Pa. at 338-339, 206 A. 2d at 292.

While we recognize the split of opinion in the state courts on this issue, we note the reported decisions in the federal courts favorable to the view that we adopt here. Wright v. Dickson, 336 F. 2d 878 (9 Cir. 1964); United States v. Guerra, 334 F. 2d 138, 144 (2 Cir.) (dictum), cert. denied, 379 U. S. 936, 85 S. Ct. 337, 13 L. Ed. 2d 346 (1964); United States ex rel. Rivers v. Myers, 240 F. Supp. 39 (E. D. Pa. 1965); United States ex rel. Dickerson v. Rundle, 238 F. Supp. 218 (E. D. Pa. 1965); Galarza Cruz v. Delgado, 233 F. Supp. 944 (D.P.R. 1964). Contra, United States ex rel. Townsend v. Ogilvie, 334 F. 2d 837 (7 Cir. 1964), cert. denied, 379 U. S. 984, 85 S. Ct. 683, 13 L. Ed. 2d 574 (1965); Mitchell v. Stephens, 232 F. Supp. 497 (E. D. Ark. 1964). In Lee v. United States, 322 F. 2d 770 (5 Cir. 1963), decided prior to the Supreme Court decisions in Massiah and Escobedo, the Court of Appeals for the Fifth Circuit recognized the right to counsel at the post-indictment interrogation stage and held that the right is not lost by the failure to request counsel. Although another panel of the same circuit refused to follow Lee on the broad ground that there was no right to counsel at that stage of the proceeding, Lyles v. Beto, 329 F. 2d 332 (5 Cir. 1964), the Supreme Court has vacated that latter judgment and remanded the case back to the Court of Appeals in light of its decision in Massiah. 379 U. S. 648, 85 S. Ct. 613, 13 L. Ed. 2d 552 (1965).

The Court of Appeals for the District of Columbia has, in dictum, agreed with the result we reach here. Greenwell

v. United States, D. C. Cir., 336 F. 2d 962, 966 (1964).[8] In two later decided cases of that Circuit, the court found the facts to be sufficiently distinguishable from Escobedo and we think that these decisions are not inconsistent with the result we have reached. In Jackson v. United States, D. C. Cir., 337 F. 2d 136 (1964), cert. denied, 380 U. S. 935, 85 S. Ct. 944, 13 L. Ed. 2d 822 (1965), that court held that where the defendant had been specifically told of his right to counsel on at least two separate occasions and had been warned three times of his right to remain silent his admissions and confession were admissible. In Long v. United States, D. C. Cir., 338 F. 2d 549 (1964), the court held that where the defendant confessed immediately upon being approached by the police and before the police could even identify themselves and after the police then informed the defendant of their identity and of the defendant's right to remain silent, he nevertheless, offered further details of the crime, the admissions and confession were admissible.

We can find no effective waiver here. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U. S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70 (1962). Compare Doughty v. Sacks, 175 Ohio St. 46, 47, 191 N. E. 2d 727 (1963), rev'd per curiam, Doughty v. Maxwell, 376 U. S. 202, 84 S. Ct. 702, 11 L. Ed. 2d 650 (1964). Accordingly, the judgments of the court below must be reversed and the cases will be remanded with directions that writs of habeas corpus issue but without prejudice to the right of the State authorities to try the defendants again on the same charges.

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[8] See also, Queen v. United States, 118 U. S. App. D. C. 262, 335 F. 2d 297 (1964); Ricks v. United States, 118 U. S. App. D. C. 216, 334 F. 2d 964 (1964).

Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)

On Petition for Rehearing and on Petitions for Leave to Intervene as Amici Curiae

Before KALODNER, Chief Judge, and BIGGS, MCLAUGHLIN, STALEY, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, Circuit Judges.

PER CURIAM.

A petition for rehearing and petitions for leave to intervene as amici curiae, to file a brief and, if rehearing be granted, to participate in oral argument, have been filed in these cases by prosecuting officers and prosecuting officers' associations as set out in the footnote.[1] We entered orders allowing these prosecuting officers and prosecuting officers' associations to file briefs in support of their respective contentions, reserving for future determination the question as to whether or not rehearing should be granted. Extensive briefs have been filed by the prosecuting officers and the prosecuting officers' associations referred to and answering briefs have been filed by counsel for the relators. We note that the brief filed jointly by the District Attorney in and for the City and County of Philadelphia and by the two District Attorneys Associations contains factual ma-

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[1] The petition for rehearing was filed by the County Prosecutor Essex County, New Jersey, by the Assistant Prosecutor, who appeared on behalf of the respondents. The Attorney General of New Jersey has filed a brief entitled "Brief on Rehearing of Amicus Curiae, the State of New Jersey."

Petitioners for leave to intervene as amici curiae, to file a brief, and if rehearing be granted, to participate in oral argument, were filed by the District Attorney in and for the City and County of Philadelphia, by the National District Attorneys Association and by the District Attorneys Association of Pennsylvania.

terial, relating to the issue of the possible retroactivity of our decision, which was not in evidence before the court below, is not part of the records in these cases,[2] and which was called to our attention for the first time on June 1, 1965, when the petition for rehearing was filed by the County Prosecutor of Essex County.

Portions of the briefs filed by the prosecuting officers and by the prosecuting officers' associations are devoted to arguments to demonstrate that our decision, any issue of retroactivity of the application of its principles aside, is erroneous.

As to any issue of the application retroactively of the principles enunciated by our opinion and decision of May 20, 1965, we state that we have considered and weighed carefully the contents of the petitions and their supporting briefs. As has been indicated, the issue of the effect of the retroactive application of the principles enunciated by this court was not before the court below and was raised for the first time before this court by the petitions referred to in note 1, supra.

Our rulings and decision in these cases were considered carefully in the light of the records and the issues which were briefed and argued in the court below and in this court. Consequently we decline, unless directed to do so by higher authority, to pass on the issue of retroactivity so lately raised. The decision of that issue should be deferred to some future and more appropriate occasion, should such arise, when the issue of retroactivity had been raised in the trial court and before this court on appeal from the

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[2] See United States v. Bowles, 331 F. 2d 742, 748-749; Rehearing den. 334 F. 2d 325 (3 Cir. 1964).

trial court and not, for the first time, by way of a petition for rehearing or by means of petitions for intervention as amici curiae as here.

The issues involved in the instant cases are of such importance that they should be put before the reviewing Tribunal as promptly as possible.

Rehearing will be denied.

McLaughlin, Circuit Judge (dissenting).

I dissent from the denial of the petition for rehearing before the court en banc in these appeals.

Escobedo is the governing law. That opinion strictly held that for a statement by an accused to be excluded from being used against him at a criminal trial, the process must be accusatory, its purpose to elicit a confession, "* * * and, under the circumstances here, the accused must be permitted to consult with his lawyer." Escobedo v. State of Illinois, p. 378 U. S. 492, 84 S. Ct. p. 1766. Earlier in the opinion the Court had factually stated that Escobedo had an attorney and had conferred with him about this particular case prior to being interrogated by the police. The Court earlier in the opinion stressed that its narrow holding included as a sine qua non that "* * * the suspect had requested and been denied an opportunity to consult with his lawyer, * * *." Konigsberg meticulously follows Escobedo and does not eliminate the above major requirement as would appear from page 12 of the present opinion.

In view of the above anything else is a minor matter but it should be said that the district judge who saw and heard the witnesses notes that both an electroencephalogram and a neurological examination found Russo to be within normal limits; that he was within the average intelligence

range; that the worst thing that could be mentioned about his mentality was that he "* * * never learned to react to others except in an impulsive and poorly controlled manner with hostility and violence and unmindful of the consequences; * * *." The court specifically holds that neither "* * * Russo or Bisignano was a mentally disturbed person of such low intelligence or capacity as to make him susceptible to police interrogation."

If the Supreme Court desires not merely to widen the Escobedo rule but to strike from it one of its three required elements and so promulgate a new test, that is up to the Supreme Court alone. Without that action an intermediate appellate tribunal has no duty and no right to make such pronouncement. In so doing, proper law enforcement under the Supreme Court mandate is unwarrantably confused, weakened and broken down.

Fairness in crime investigation is no one-way street. A person interrogated with reference to a crime is entitled to full fair play but so is the investigative authority. Due process for law and order—for the public, by proper questioning of suspects has its rightful place under Escobedo. The majority here in its enthusiasm would simply eliminate lawful authority from the equal protection of due process. The destruction of the true balance of criminal justice could well be the net result of the court opinion.

FORMAN, Circuit Judge (concurring).

As a senior judge, I am restricted from voting on the petition for rehearing before the court en banc. Limiting myself to the question of whether the *panel* should grant rehearing, I have concluded that it should not and, therefore, concur in my colleagues' denial of the petition. I am con-

strained, however, to rest on grounds other than those relied upon by the majority.

While the litigants never raised the legal issue of Escobedo's retroactivity prior to filing the petition for rehearing, the relevant facts, namely, the date of the exhaustion of direct appeal remedies by the habeas corpus applicants (June 17, 1963), and the date of the Escobedo decision (June 22, 1964), were before the court and are matters of record. United States v. Bowles, 331 F. 2d 742 (3 Cir. 1964) is not controlling for there the relevant facts were definitely absent from the record. Any other factors bearing on the ultimate determination of the issue are purely legal in nature.

If I had not felt Escobedo to be retroactive, I would not have favored reversal of the District Court. It is not unusual, particularly in the light of the failure of litigants to raise the issue, to apply new constitutional rules to cases finalized before the promulgation of the new rule, without discussion. See Linkletter v. Walker, 381 U. S. 618, 628, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (text and n. 13) (1965). Indeed, we could not have ruled in the manner in which we did unless Escobedo was to be applied retroactively. And Russo and Bisignano should not have been given the benefit of Escobedo unless we were willing to apply it retroactively.

In support of the rehearing, the petitioner and amici themselves rely heavily on Linkletter v. Walker in which the Supreme Court declined to give retroactive effect to Mapp v. State of Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). There is, however, an important distinction between Mapp and Escobedo relative to the question of their retroactivity. In Mapp, the Supreme Court dealt with evidence seized in a search held to be violative of the accused's fourth amendment rights. There was no question

of the reliability of the evidence sought to be introduced subsequent to the illegal search. Mapp thus enunciated a rule limited to deterring unlawful police activity. Linkletter gave emphasis to this factor in rejecting arguments favoring Mapp's retroactivity, Linkletter v. Walker, 381 U. S. at 637, 85 S. Ct. 1731, and the petitioner follows suit herein. At the same time, the Supreme Court announced a standard for measuring when a new constitutional rule should be applied retroactively. The test is: When the repudiated rule could have affected "the fairness of the trial—the very integrity of the fact finding process"—the new constitutional principle is to be applied retroactively. As measured by this standard Escobedo should be applied retroactively. The problems of the administration of justice considered in Mapp may not thwart such application here. See Linkletter v. Walker, 381 U. S. at 637-639, 85 S. Ct. 1731.

The new rule of Escobedo was not one limited to deterring unlawful police activity. To be sure, that was one of the important considerations in announcing the rule. But there were others of at least equal importance. Two critical factors emerge which reflect the underlying policy of the Escobedo rule, namely, (1) the assistance of counsel at the accusatory stage of the proceedings enables the accused to properly exercise his right, and (2) implementing a right to counsel at the accusatory stage assists in the difficult task of resolving the question of coercion where a confession is obtained during a closed interrogation. See Note, The Curious Confusion Surrounding Escobedo v. Illinois, 32 U. Chi. L. Rev. 560, 563-64 (1965) and cases cited therein. When a conviction is sought assisted by the introduction of a confession, failure to apply the Escobedo rule (which now enables an accused to properly exercise his rights at the ac-

cusatory stage of the proceeding and maximizes the ability of the judiciary to rule on the voluntariness of a confession) has the potential to impair the fairness of a trial and to weaken the integrity of the fact finding process.

The petitioner seeks to avoid this result by emphasizing that both the District Court and this court found Russo's and Bisignano's confessions voluntary. That being so, argues the petitioner, their introduction into evidence could not have resulted in an unfair trial or distorted the fact finding process. The petitioner, however, misconceives the Escobedo standard of confession admissibility. We affirmed the District Court's findings of voluntariness by considering the traditional grounds of physical coercion and mental overbearing in the light of the facts available to us. A finding of either would serve as a basis for ruling a confession involuntary and inadmissible. Escobedo, however, made the factor of counsel's non-participation at the accusatory stage of the proceeding another independent basis for confession inadmissibility. This new standard, as is indicated above, in part stemmed from the view that at the accusatory stage of the proceeding the inability to implement one's rights may have a potent effect on the voluntariness of a confession. The difficulty in making a judicial determination of voluntariness, absent counsel's participation at the accusatory stage of the proceeding, heightens the potentiality for undetermined involuntariness. As was indicated in our opinion in the instant case, a greater reliance has been placed on the presence or absence of counsel as a means of determining voluntariness of confessions. Thus, though it could not be said that the traditional standards of voluntariness were violated, based on the record before us, neither could it be said that the potential of an involuntary confession was absent in the light of the policy underlying Escobedo.

The foregoing impels me to the conclusion that rehearing by the panel should be denied, but for my part I would clearly state that Escobedo has been given retroactive effect in these cases.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 834

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA, *ex rel.* ANTHONY RUSSO and UNITED STATES OF AMERICA, *ex rel.* FRANK BISIGNANO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix of Petitioners (P1a to 30a) are reported in 351 F. 2d 429 (3 Cir. 1965).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing on June 1, 1965. The Attorney General of New Jersey, *amicus curiae*, filed a brief in support of the petition for rehearing. The petition was denied on October 13, 1965.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the rule of *Escobedo* v. *Illinois* require the suppression of free and voluntary confessions made to law enforcement officers by persons questioned about or suspected of crimes, who have neither requested nor been refused counsel, solely because the investigating authorities did not advise such persons of their right to remain silent, of the fact that anything they said might be used in evidence or of their right to consult with counsel, where there has been no denial of substantial justice, fair treatment or due process?

2. Is the decision in *Escobedo* v. *Illinois* as extended by the Court below to be applied retroactively with respect to judgments of convictions based upon essentially fair and just criminal proceedings, where full appeal and judicial review had been accorded and completed and such judgments had become final before the *Escobedo* decision was rendered?

Constitutional Provisions Involved

The relevant constitutional provision involved directly in the instant case is the Sixth Amendment to the United States Constitution which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

There may also be involved in the instant case the interrelationship between the Sixth and Fifth Amendments to the United States Constitution. The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself; nor to be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Statement of the Case

Petitioners-Appellants were indicted for murder on March 30, 1961. They were tried and convicted before the Essex County Court on July 8, 1961, and their appeals to the New Jersey Supreme Court were completed on January 21, 1963. *State* v. *LaPierre*, 39 N. J. 156 (1963). The

avenues of direct appeal having been exhausted, they thereafter sought issuance of writs of habeas corpus. On February 13, 1964, this was denied to them by the United States District Court for the District of New Jersey, and petitioners appealed to the Third Circuit. *Escobedo* v. *Illinois*, 378 U. S. 478 was decided on June 22, 1964. The Third Circuit Court of Appeals entered an order in the instant matter, reversing the District Court on May 20, 1965.

On May 26, 1965, the County Prosecutor of Essex County petitioned this Court for rehearing. Thereafter on June 11, 1965, the Attorney General of the State of New Jersey petitioned for leave to intervene as *amicus curiae*. On June 23, 1965, an order was entered directing the Attorney General to file a typewritten brief in support of the relief he sought within 20 days, and to set forth his reasons, with supporting authorities for concluding that the decision of the court handed down herein on May 20, 1965, was in error. On October 13, 1965 the court denied the petition for rehearing.

Reasons for Granting a Writ of Certiorari

1. The decision below involved an unwarranted expansion of the rule of law set forth in *Escobedo* v. *Illinois*.

2. The decision below in its extension of the *Escobedo* v. *Illinois* rule has decided novel and important questions of constitutional law, which have not heretofore been determined by this Court.

3. The *sub silentio* implied retroactive treatment accorded *Escobedo* v. *Illinois* in the instant case by the court below constitutes a decision of an important and difficult question of Federal constitutional law which has not been, but should be, determined by this Court.

4. An important and unsettled question of constitutional law as to the application of the assistance of counsel provision of the Sixth Amendment and the application and interrelationship of the Fifth Amendment during police questioning requires review of the decision below.

5. Recognition of the importance of the issues contained herein has been signaled by the granting of *certiorari* in cases involving similar issues as those here presented and *certiorari* should likewise be granted in this case to afford a complete and exhaustive treatment of this vital area of the criminal law.

6. Conflicting decisions on the application of the rule of law of *Escobedo* v. *Illinois* to factual circumstances and on the retrospective effect of *Escobedo* exists among Courts of Appeals of the United States, and among State Supreme Courts.

7. Confusion and conflict exist within the Third Judicial Circuit on both the scope and retroactivity of *Escobedo* v. *Illinois* so as to require review by this Court.

POINT I

The decision rendered by the Third Circuit Court of Appeals involved an erroneous application and expansion of the Sixth Amendment to the United States Constitution as expressed by this Court in *Escobedo* v. *Illinois* and has thus established a new rule of law and settled an important issue of Federal Constitutional Law which has not been, but should be, determined by this Court.

We are here confronted with the use and admissibility in evidence in criminal proceedings of voluntary confessions. The court below considered carefully whether the confes-

sions of Frank Bisignano and Anthony Russo had been coerced. In its examination of the voluntariness of their confessions, it treated claims of both physical and psychological coercion. The court rejected the arguments that the confessions were involuntarily obtained and found them to be uncoerced and voluntary. The confessions were found to be voluntary by the New Jersey Supreme Court, *State* v. *LaPierre*, 39 N. J. 156 (1963), and this question was presumably passed by this Court in denying a Writ of Certiorari, *Bisignano* v. *New Jersey*, 374 U. S. 852 (1963).

Despite the fact that the confessions were entirely voluntary, the court below reversed the convictions on the ground that the confessions were obtained in violation of the defendants' constitutional right to counsel under the Sixth Amendment to the United States Constitution. Thus, in our opinion, for the first time the Federal Circuit Court of Appeals gave, as a separate and independent reason for rejecting an otherwise voluntary and trustworthy confession in a criminal proceeding, the Sixth Amendment.

The Court of Appeals in holding that the confessions were inadmissible relied on the following factors: (1) neither Russo nor Bisignano were at any time, prior to the signing of their confessions, informed that they had a right to remain silent, (2) the defendants were not advised that they had a right to counsel, and (3) they were not told that anything they said could be used against them (P6a).

The opinion of the court below discusses *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Massiah* v. *United States*, 377 U. S. 201 (1964); and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). Ostensibly, principal reliance was placed upon this court's opinion in *Escobedo* v. *Illinois, supra*. In prac-

tical effect, however, the court below expanded this Court's holding in *Escobedo* to establish an absolute rule that *any* confession would be inadmissible which is obtained without counsel present wherein defendant has not been advised of his right to counsel, of his right to remain silent and of his right to be informed that any statements elicited from him could be used against him, without regard to other countervailing circumstances indicating that the defendant had not been denied essential due process.

It is strongly urged that this expansion and extended application is not called for by *Escobedo,* is unsound, and the Court of Appeals was, therefore, in error.

The salient facts in *Escobedo* should be firmly in mind in order to understand fully its import in the case *sub judice.* The defendant in *Escobedo* was a 22 year old male of Mexican extraction with no prior record with the police, who was arrested on January 20, 1960 in connection with the fatal shooting of his brother-in-law. He was released the same day at 5:00 P.M. by reason of a writ of habeas corpus obtained by his attorney. Danny Escobedo was rearrested on January 30 at 9:00 P.M. and was informed, while en route to the police station, by detectives that "they had us pretty well, up pretty tight and we may as well admit to this crime." At that point in time, defendant Escobedo requested counsel. Upon arrival at the police station, defendant again requested to see his counsel, but was denied the opportunity to do so. In fact, defendant's attorney arrived at the police station between 9:30 and 10:00 P.M. and requested to see his client, but was denied permission to do so. During the course of interrogation, Officer Montejano, who grew up in defendant's neighborhood, and who spoke Spanish, interrogated defendant. For the first time, defendant admitted his complicity in the murder of his brother-in-law.

Notwithstanding repeated requests by both the accused and his retained lawyer, no opportunity for consultation through the course of the entire interrogation was afforded. At one point, the accused and his attorney came into each other's view for a few moments, but the attorney was quickly ushered away. *Escobedo* v. *Illinois, supra,* at p. 481. Furthermore, Escobedo's lawyer was advised by the police that he could not see his client until they were through interrogating.

Confronted with these facts, this Court concluded:

> "We hold, therefore, that where, *as here,* the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S., at 342, 83 S. Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U. S. at p. 491. (Emphasis added.)

The Court later restated its position:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system beings to operate, and, *under*

> *the circumstances here,* the accused must be permitted to consult with his lawyer.'' 378 U. S. at p. 492. (Emphasis added.)

Thus, while *Escobedo* clearly extends the Sixth Amendment right to counsel to the period when the focus of prosecution has turned upon the suspect, whether or not formal charges have been made, the test of whether the right to counsel has been denied depends upon whether due process has been extended to the defendant. This in turn calls for a careful review of the factual circumstances surrounding the alleged claim of infringement of the right to counsel. In failing to assess the totality of relevant circumstances preceding, surrounding and following the voluntary confessions, the court below, in our opinion, committed error.

The totality of the circumstances in the instant case indicate that there was no denial of due process, and that the right had not yet attached under the Sixth Amendment. Therefore, it cannot be said that defendants had been denied their constitutional right to counsel.

Frank Bisignano, age 22, was brought to police headquarters at 11:15 A.M., on March 16, 1961. The evening before, he had visited his wife and Russo's girl friend to construct an alibi. His statement admitting complicity was rendered that afternoon and was reduced to writing and concluded by 6:30 P.M.

Anthony Russo, age 21, had been wounded and in the early morning hours had been taken to Martland Medical Center. Initially, Russo refused permission for an operation to remove the bullet, but subsequently, on the 17th, he agreed to the operation. Shortly after the operation, defendant Russo gave an oral statement admitting to his participation in the attempted robbery and murder of

Joseph Hagel, the off-duty policemen, at Hahn's Tavern in Newark, New Jersey. On March 23rd he was taken from the hospital to Newark police headquarters where he gave a written statement reflecting his previous oral statements.

In the instant case there were no efforts, direct or indirect, concerted or general, to deny defendants any opportunity to confer with an attorney or, for that matter, with friends, relatives or anyone else. The defendants in the instant case were well attuned to police procedure and were court-wary individuals. Bisignano was on parole following conviction for grand larceny and Russo was awaiting sentence for armed robbery. Neither of these defendants could be said to be unfamiliar with law enforcement procedures. In fact, Russo evidenced his sense of legal self-preservation by refusing to allow a bullet to be removed from his arm for fear that it would implicate him in the crime. If Russo had the cunning not to have the incriminating bullet removed, *a fortiori* he certainly possessed the intelligence not to incriminate himself by his own statement unless he were of a free will to do so. Any hint moreover that their respective confessions were anything less than voluntary is dispelled by their reenactment of the crime. In short, there was no untoward conduct against the defendants on the part of the police and no lack of essential fair play.

These circumstances stand in sharp relief against the background of *Escobedo*. The flagrant abuse which occurred in *Escobedo* in regard to the adamant refusal to permit the defendant to consult with his attorney despite his repeated requests, the state of isolation and helplessness to which Escobedo had been reduced, and the continued and designed conduct of the police to keep the attorney away from the defendant in the course of interro-

gation are absent in the present case. In *Escobedo* there was, in every sense of the word, a *denial* of counsel and this factor, totally missing in the case *sub judice*, demonstrates its inapplicability herein. The crucial test set forth in *Escobedo*, to measure the denial of assistance of counsel in the context of the total circumstances, indicates forcibly that no constitutional deprivation to the right to counsel occurred in the instant case.

It is to be emphasized and reiterated that both defendants in the case *sub judice* were found to have given uncoerced confessions under Fifth Amendment standards. Although this Court in *Escobedo* found that the denial of counsel constituted a violation of the Sixth Amendment, its approach to and resolution of the legal issue recognized implicitly the applicability of Fifth Amendment standards. Obviously, this Court was satisfied under the total circumstances surrounding the arrests and interrogation of the accused that there was a denial of fundamental justice and fairness, an absence of due process, crystallized specifically in the failure to accord the accused the assistance of his already retained counsel and for that reason the right to counsel at criminal trial guaranteed by the Sixth Amendment, as required by *Gideon* v. *Wainwright*, *supra*, was rendered nugatory.

The *Escobedo* decision, examined critically in the light of the particular facts, blends the ingredients of both the Fifth and Sixth Amendments into a single formulation in ascertaining whether the absence of counsel in *pre*-judicial proceedings attains constitutional stature. As previously noted, this Court in *Escobedo* considered several important relevant factors in determining whether the accused had in fact been denied access to counsel and in assessing the impact of such denial. Such factors, all of the relevant circumstances, must be examined and weighed to determine,

as a matter of fundamental justice and fair play, whether there has been a *constitutional denial* of counsel.

If *Escobedo* combines, as we strongly assert it does the elements of the Fifth and Sixth Amendments in considering whether there has been a constitutional denial of counsel, it is vigorously pressed that there has been no violation of the letter or spirit of constitutional rights and guarantees, *sub judice*. The court below in effect held that where the procedure had become accusatory, the mere failure to advise an accused of his right to counsel is *per se*, a violation of the Sixth Amendment whether or not a request had been made. This approach ignores completely the importance of all factual circumstances surrounding a confession and disregards completely any notions of constitutional due process. It is an unwarranted extension of *Escobedo* which decision indicates clearly that no single factor should be determinative.

It is difficult to consider how the failure to advise an accused of his right to counsel alone can become a self-sustaining, meaningful and workable rule in determining the attachment of the Sixth Amendment guarantee. If a particular suspect has been advised of his right to counsel, without more, this would not under all circumstances satisfy the constitutional requirement of assistance of counsel. Difficult and confusing problems would undoubtedly arise if a suspect did not thereafter actually request counsel. Thus there would be the problem of determining whether there had been an intelligent or voluntary waiver of such right, as where a person might later claim to have been under the influence of narcotics, or alcohol, or in a state of mental disorientation or emotional upset or of low mental capacity. It would put an undue burden on law enforcement officers to prove negatively that such factors were nonexistent and the waiver of counsel had been a sensible

one. Conversely an individual may be very much aware of his constitutional right to counsel from his prior exposure to criminal processes as in this case. If law enforcement officers, in the critical and emergent moments of detection and arrest, inadvertently fail to advise such person of his right to counsel, the suspect may adroitly void the use of any incriminating statement that he might make by taking advantage of such an omission. Or, problems might arise concerning whether or not arresting officers had a reasonable opportunity to advise a suspect of his right to counsel before the individual gratuitously furnished a damaging statement. Moreover a particular individual may be of such low mental capacity or other mental disability, although not apparently so, that the simple advice of his right to counsel might indeed be an empty gesture.

In short, the factor of advising an accused of his right to counsel is not of itself a meaningful criterion. The attachment of the Sixth Amendment guarantee should not hinge on this fact alone and, by isolating this factor into a solitary, hard and fast rule, a disservice may be rendered both to society and to the individual. In too many cases the cunning person from whom society needs protection may escape the pitfalls of effective prosecution and be freed to prey on society while the uneducated, gullible or hapless individual may be convicted and incarcerated without regard to fair play and due process.

The expansion of *Escobedo* effected by the court below, creating a novel point of law has a drastic impact on law enforcement. It gives rise inevitably to a parade of absurdities and impracticalities which will further compound the confusion in this area and confound the work of law enforcement officers at the critical moments of detection, arrest, and investigation up to arraignment.

If the *Escobedo* extension by the Third Circuit Court of Appeals becomes the operative law, policemen will have to engage in the most refined linedrawing and distinctions. They will be required to know, for example, the precise, magical moment at which to advise a suspect of his right to counsel in order not to imperil the elicitation of further evidence. Confusion may arise in situations where the detective or policeman may suspect the witness as the culprit but his supervising officer, a police chief, bureau head, district attorney or prosecutor may not have focused upon the witness as the accused. Or conversely, the policeman may consider the individual only as a material witness but his superiors may have already determined in their minds that this person is the prime suspect. Notwithstanding that statements elicited might be completely voluntary, there has been opportunity to obtain counsel and to confer with other persons, a prompt arraignment and, in general, judicial fair play accorded the defendant, prosecutions would be jeopardized by the new *Escobedo* rule of the court below.

Similar problems would also confront local law enforcement officers with regard to the types of statements involved. If confessions, admissions of guilt, may be excluded from evidence, what should be the rule with respect to other types of statements? Statements made without the presence of counsel, which are not admissions of guilt as such, but which may lead to inculpatory evidence which fastens guilt upon the declarant—such as the identification of objects, persons or the whereabouts of the potentional defendant at the time of the crime—may also be tainted under the application of the rigid test enunciated by the court below. Under the exclusionary rule recognized in other decisions, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *McDonald* v. *U. S.*, 335 U. S. 451 (1948), it would appear that

the fruits of such statements might not be utilized. It must occur, not infrequently, that a witness, while not confessing, might disclose to arresting officers his whereabouts at a critical time, or his ownership or possession of clothing, or automobile, or wallet or watch, or he might explain his relationship or familiarity with other persons, all of which may ultimately tie him into the crime. The sterilization of such evidence must necessarily fetter law enforcement.

Such considerations are only suggestive of the real and serious problems which will be engendered by an adoption of the Third Circuit Court of Appeals' rendition of the *Escobedo* case. They stress the point that where the focus has shifted from a general inquiry of an unsolved crime to the accusatory process, the Sixth Amendment applies absolutely. They then isolate the single factor of whether the accused has been advised of his right to counsel from the general criteria considered relevant by this Court in *Escobedo* and ignore the totality of the circumstances and the standards of constitutional due process which are implicit in *Escobedo*. It is this test of totality which should be applicable in assessing the impact and effect of absence of counsel in *pre*-judicial criminal proceedings.

The Court must look to all relevant circumstances surrounding the alleged constitutional deprivation to determine whether there has been a denial of the right to counsel in a constitutional sense. Where, as in *Escobedo*, the defendant has effectively asserted and claimed his right to counsel, has indeed retained counsel, has requested to see him and his counsel in turn is anxious to consult with his client, the pattern is one of deliberate, purposeful police interference with the accused's right to counsel which is tantamount to a denial of basic due process. There has, under such circumstances, occurred unquestionably a *denial* of the constitutional right to counsel. Yet to rule, as did

the court below, that voluntary admissions made during routine and necessary questioning immediately following a crime and arrest are inadmissible, where in no practical and meaningful sense there was an absence of fair play or due process or an actual denial of an asserted right to counsel, is to substitute a rigid and unrealistic test. It is in disregard of the total circumstances and concepts of due process which are the basic measure of the constitutional right. The unavoidable implication of such a test is to require, without fail, the presence of an attorney at all times in the police station, if not on the beat itself. In no other way could law enforcement officials overcome the insurmountable difficulties in utilizing material statements in the nature of confessions in the face of later claims that there had been no effective forewarning or no intelligent waiver. If, as noted in the accompanying Petition for a Writ of *Certiorari,* no attorney "worth his salt" would fail to advise his client "to shut up", courts must accept the ultimate fact that there will be no confessions available in criminal prosecutions.

The overriding importance of these problems and their prompt and effective resolution by this Court, especially in the light of increasing crime rates and social conditions prevalent in modern society, demand the full exposition of the issues and the opportunity to present arguments in depth to the end that neither this Court's decision in *Escobedo* nor sound policy dictates the severe curtailment or elimination of the use of confessions implicit in the decision of the court below. For these reasons, it is respectfully urged that full review of the instant case be accorded by this Court.

POINT II

Assuming that the Court below properly extended the ruling in *Escobedo* v. *Illinois* it should not be applied retroactively to criminal cases in which conviction and direct appellate review have been concluded.

With regard to the retroactive operation of *Escobedo* v. *Illinois*, as extended by the court below, we concur in the remarks as set forth in the Petition for Writ of *Certiorari*. We feel it appropriate, however, because of the magnitude of this issue to provide additional comment.

It might be said that *Escobedo* v. *Illinois, supra,* occupies a middle ground somewhere between *Gideon* v. *Wainwright, supra,* and *Linkleter* v. *Walker,* 381 U. S. 618 (1965). *Gideon* v. *Wainwright* held the right to counsel at trial must be applied retroactively while *Linkletter* v. *Walker* held that *Mapp* v. *Ohio, supra,* dealing with the use of illegally seized evidence would not be applied retroactively. Therefore the determination of retroactivity in *Escobedo* depends upon whether it is more akin to *Gideon* or to *Linkletter*.

Gideon, of course, dealt with the lack of participation of counsel at trial. Because of its similarity to *Escobedo* in that the right to counsel was extended to another critical stage of a criminal proceeding, it has deceptive appeal for an analogy. A syllogism could easily be formulated as follows: *Gideon* involved a lack of participation of counsel and was retroactively applied. *Escobedo* involved a lack of participation of counsel. Therefore, *Escobedo* should be applied retroactively. Simple logic, however, cannot control the result that should obtain. The fact that both *Gideon* and *Escobedo* deal with constitutional denial of the "assistance of counsel" under the Sixth Amendment does

not in and of itself put them in the same category for the purpose of retroactive application. There are substantial and important differences between these cases.

Underlying the rationale of the retroactive effect given to the *Gideon* case is the fundamental concept that every person is entitled to his day in court. *Gideon* had, in fact, less than his day in court when he was denied the right to counsel at his trial. Moreover, without the assistance of counsel an otherwise innocent defendant could "face the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932). The reliability of the judicial determination of guilt, where defendant was handicapped in his defense, was questionable. This inherent doubt necessarily clouds the result and cannot be dispelled.

> "*Gideon* expresses judicial realization that denial of counsel during judicial proceedings has the clear capacity to result in the conviction of a guiltless man." (*State* v. *Johnson*, 43 N. J. 572, 584 (1965)).

Gideon, therefore, achieved retroactive treatment. No other course of action, except to set aside the entire proceedings, could satisfactorily assure a correct or sound determination of guilt.

Linkletter v. *Walker*, *supra*, held that the *Mapp* v. *Ohio* rule, barring the use of illegally seized evidence at trial in the state courts, should not be applied retroactively. The Court recognized and emphasized that the purpose of the exclusionary rule was to deter untoward conduct of law enforcement officials in their quest for evidence and to guide within constitutional channels the actions of such officers in their enforcement of the criminal laws. A retroactive application of the rule in the particular case to set

aside the conviction would not have furthered its overall purpose of influencing in the future the attitude and conduct of law enforcement officers.

Additionally, if *Mapp* v. *Ohio, supra,* had been accorded retroactive application, the reopening of a multitude of cases would have been a reality. Many of the states prior to the *Mapp* decision were not following the exclusionary rule which was then made applicable to all the states through the Fourteenth Amendment. The law enforcement officials in the states were not on notice that what they might be doing by way of investigation and securing evidence was unconstitutional. In fact, they were justified in relying on *Wolf* v. *Colorado,* 338 U. S. 25 (1949), which held that the exclusionary rule did not apply to the states. *State* v. *Johnson, supra,* at p. 589.

Mapp, as noted, had the salutary effect of formulating a standard as to exclusion which could be followed by officers in the future. This effect, as just observed, would not be particularly enhanced by giving the *Mapp* rule application retrospectively in cases long since concluded.

The court in *Linkletter* also emphasized that the potential inaccuracy of the judicial result reached was not a present factor. Any doubts with respect to the correctness or fairness of the conviction could be assessed and resolved without setting aside the conviction. Thus, in that particular case, the defendants could be accorded full due process and were fully protected insofar as an accurate estimation could be made on all of the evidence in the record to establish whether or not they had actually committed the acts with which they were charged, without regard to the improperly secured evidence. There was no need, therefore, to set aside the conviction retroactively.

In *Gideon*, by way of contrast, the assistance of counsel to present a defense on behalf of an accrued during trial was considered to be so vital and indispensable that there could be no way to assess the effect of the lack of counsel and its impact on the final result. Hence the prior conviction had to be set aside.

Moreover, retroactive application in *Gideon* did not portend a holacaust in the administration of criminal justice. No overwhelming flood of relitigation and reopened proceedings was anticipated because many states had theretofore recognized a criminal defendant's right to counsel at trial in both capital and non-capital cases. Many states were already complying with the constitutional mandate of the Sixth Amendment as applied to the states through the Fourteenth Amendment, by furnishing counsel to the accused at the time of trial. See Israel, "*Gideon* v. *Wainwright: The 'Art of Overruling,'*" *The Supreme Court Review*, 211, 267-267 (1963). This was unlike the problems involved with respect to the use of unlawfully seized evidence, where the practical administration of justice would have been sorely strained if *Mapp* v. *Ohio* were accorded retroactive treatment. As the court in *Linkletter* stated:

> "Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial would not be available or if located, their memory would be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Linkletter* v. *Walker, supra*, pp. 637-638.

Since, as previously noted, many states had not before *Mapp* followed its edict, but rather tailored their practices

to the contrary standards of *Wolf* v. *Colorado, supra,* the court could well have anticipated a deluge of cases which would be released by a retroactive application of *Mapp.*

The *Linkletter* court set forth the guidelines by which the decision respecting retroactivity should be arrived at:

> ". . . we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." *Linkletter* v. *Walker, supra,* at p. 629.

Measured against the test set forth in *Linkletter* and the court's approach and consequent results in both *Gideon* and *Linkletter,* it is submitted that the retroactivity of *Escobedo* v. *Illinois* finds its analogue in the *Linkletter* case.

In an *Escobedo* kind of situation the concern is directed at the right of counsel at the time of questioning and not at the trial level. The defendant is accorded his day in court and there is no fundamental unfairness with regard to the interest of the particular defendant at the trial which requires the judiciary to remedy a defect in the court proceedings. The court by holding *Gideon* retroactive was correcting that which could not be obviated but had to be erased because the conduct involved did not relate to law enforcement officials but to the judiciary, its own branch of government. In *Gideon* the court properly effected a self-policing measure.

In an *Escobedo* situation the retroactive application would not further the purpose of the rule. If the courts are concerned with sterilizing the police antechamber, i.e., to steer police tactics into a constitutional course with respect to interrogations and confessions, retroactivity would be inappropriate. See *People* v. *Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965).

The catastrophic effect on the administration of justice if an *Escobedo* case were held to be retroactive cannot be measured. When *Gideon* was decided only a few states still denied counsel to the accused at a trial in a noncapital case. See Israel, *Gideon* v. *Wainwright, The "Art" of Overruling, The Supreme Court Review, supra.* However, at the time *Escobedo* was decided, almost all the states permitted the introduction of voluntary confessions given, in the absence of counsel, during police investigation. *State* v. *Johnson, supra,* at p. 584. Criminal cases from nearly every jurisdiction in the country would have to be reopened. *In re Lopez,* 42 Cal. Rptr. 188, 398 P. 2d 380, 390 (1965). Thus, the guidelines established by this court in *Linkletter* v. *Walker, supra,* militate strongly against the retroactive application of *Escobedo* or *Escobedo* as extended by the court below.

POINT III

The decision below conflicts with that of other federal and state courts in regard to both the courts interpretation of *Escobedo* v. *Illinois* and its retroactive effect.

The decision of the Third Circuit Court of Appeals in the instant case is in clear contradiction to that of other federal and state tribunals in regard to both the interpretation of the rule of law in *Escobedo* and the retroactive effect to be given to that decision.

The Fourth, Fifth and Seventh Circuits and various States courts have held that both a request and denial of the right to counsel are prerequisites for the operation of the *Escobedo* standard. *Davis* v. *State of No. Carolina,* 339 F. 2d 770 (4th Cir. 1964); *Edwards* v. *Holman,* 342 F.

2d 679 (5th Cir. 1965); *United States* v. *Childress*, 347 F. 2d 448 (7th Cir. 1965) and *United States, ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (7th Cir. 1964) *cert. denied* 379 U. S. 984 (1965); *State* v. *Coleman*, 46 N. J. 16, — A. 2d— (1965); *Slugris* v. *Maryland*, 235 Md. 343, 201 A. 2d 681 (1964); *Illinois* v. *Hartgreaves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964) *cert. denied* 380 U. S. 961 (1965). The Second Circuit, in two recently decided cases, held that *Escobedo* did not require that a suspect be advised of his right to silence and of his right to counsel prior to questioning or of making any statement to the police. *United States* v. *Robinson*, —— F. 2d ——— (2nd Cir. Nov. 22, 1965); *United States* v. *Cone*, ——— F. 2d ——— (2nd Cir. Nov. 22, 1965). Additionally, on December 2, 1965, the Second Circuit ruled that a confession obtained during questioning wherein there had been no request for counsel would not *per se* be a constitutional violation. The court decided that the circumstances of each individual case must be carefully examined and whether a confession has been obtained in violation of the constitutional right to counsel will depend upon the particular patterns of fact. *United States* v. *Drummond*, —— F. 2d ——— (2nd Cir. Dec. 2, 1965). See also *Cephus* v. *United States*, ——— F. 2d ——— (D. C. Circuit 1965).

State and federal courts are equally split as to the retroactive effect of *Escobedo*. While the Third Circuit in the present case, by implication, construed *Escobedo* in a retroactive manner, the Seventh Circuit in *Walden* v. *Pate*, —— F. 2nd ——— (7th Cir. 1965) ruled that *Escobedo* was not to be applied retroactively in a post conviction proceeding. See also *United States, ex rel. Conroy* v. *Pate*, 240 F. Supp. 237 (N. D. Ill. 1965); *Timmons* v. *Peyton*, 240 F. Supp. 749 (E. D. Vir. 1965); *State* v. *Johnson*, 43 N. J. 572 (1965); *In re Lopez*, 43 Cal. Rptr. 188, 398 P. 2d 380 (1965); *Commonwealth* v. *Negri*, —— Pa. ———, 213 A. 2d 670 (1965).

The gravity of the situation is particularly apparent within the Third Circuit. While the New Jersey Supreme Court as a result of its decision in *State* v. *Coleman, supra,* has decided that a request for counsel and the denial thereof is necessary for the operation of the *Escobedo* test, a defendant, by reason of the instant decision is free to walk across the street to the federal court house and obtain a different ruling. The decision in *State* v. *Johnson, supra,* intensifies the problem in regard to retroactivity. Even more absured is the situation which prevails in Pennsylvania, where the state courts, for the purposes of uniformity, have agreed to conform to the Third Circuit's interpretation of *Escobedo,* but refuse to apply it retroactively. *Commonwealth* v. *Negri, supra.*

The instant case, therefore, invites this court to exercise its reviewing power to unify and reconcile those conflicting and confusing interpretations accorded to *Escobedo* v. *Illinois, supra.* The confusion generated by the various state and federal courts filters down to making the task of law enforcement an impossible one. Prosecutors' staffs are unable to determine when a confession is questionable. When viewed in light of law enforcement officials' duty to represent and protect society, the doubt that prevails as to when or when not a confession is admissible prevents proper performance of their sworn duties.

Uncertainty in the prosecution of criminal cases is complemented by doubts as to what constitutes constitutional law enforcement in the confession area. Certainly if the prosecutors are sorely tried to define constitutionally permissible methods of questioning, the law enforcement arm, *i.e.*, the policeman on the beat, cannot be held accountable for the knowledge that his superior does not possess.

It is submitted that there is an immediate need for clarity to be brought to bear on the problems spawned by the decision in *Escobedo.*

CONCLUSION

For the reasons discussed herein, it is respectfully urged that *certiorari* should issue to review the decision of the court below.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1965.

No. 834.

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA ex rel. ANTHONY RUSSO and UNITED STATES OF AMERICA ex rel. FRANK BISIGNANO,

Respondents.

BRIEF OF THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF OF THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The District Attorney of Philadelphia County, Commonwealth of Pennsylvania, as amicus curiae, respectfully joins in the prayer of the State of New Jersey that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on May 20, 1965 (Rehearing Denied October 13, 1965), reported in 351 F. 2d 429 (3 Cir. 1965).

THE INTEREST OF THE AMICUS CURIAE.

The Commonwealth of Pennsylvania has a vital interest in the ultimate disposition of the questions raised in the instant petition for writ of certiorari. This was recognized by the court below when it entered an order allowing the District Attorney of Philadelphia County and various District Attorney Associations, state and national, to file briefs in support of their respective contentions.[1] A joint brief for the District Attorney of Philadelphia County and for the District Attorney Associations was presented to, and considered by, the court below. The extent and nature of the interest of the District Attorney of Philadelphia County will be set forth in our argument. This brief is filed, without prior consent, pursuant to Rule 42 (4).

ARGUMENT.

Since the reasons for granting the writ in this case, as set forth in the Petition of the State of New Jersey, are most persuasive, and represent as well the position of the Commonwealth of Pennsylvania, there is no need here to reiterate the arguments advanced in support of the petition. The Commonwealth of Pennsylvania, however, has an additional reason to advance in urging that certiorari be granted.

When the decision in *Escobedo v. Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), was announced, the Supreme Court of Pennsylvania construed its ruling to be limited to the particular facts of the case and specifically

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[1] See Appendix to Petition for Writ of Certiorari, Opinion of Court of Appeals on Petition for Rehearing, 23a.

so stated in *Commonwealth ex rel. Linde v. Maroney*, 416 Pa. 331, 206 A. 2d 288 (1965), and *Commonwealth v. Patrick*, 416 Pa. 437, 206 A. 2d 295 (1965). The Supreme Court of Pennsylvania interpreted *Escobedo* to hold that "where a person in police custody is not warned of his constitutional right to remain silent during an accusatorial interrogation, it is necessary that he then be given the assistance of counsel to protect that right, *if such assistance is requested.*" (Emphasis in original.) *Commonwealth v. Negri*, 419 Pa. 117, 120, 213 A. 2d 670 (1965).

It is, of course, abundantly clear that this interpretation of the meaning of *Escobedo* has been shared by other jurisdictions, both state and federal, and that still other jurisdictions, state and federal, have reached another result. (See *Negri*, supra, at pages 120, 121.) In this state of conflict, the Court of Appeals for the Third Circuit, in the instant cases (*Russo* and *Bisignano*), by its holdings contrary to the previous holdings of the Supreme Court of Pennsylvania, has created "a serious problem for this Court" which has jeopardized "the finality of . . . judgments in relevant cases" (*Negri* at page 121).

Accordingly, the Supreme Court of Pennsylvania, following the ruling of the Court of Appeals in the instant cases, was impelled to say:

> "If the Pennsylvania courts refuse to abide by its (Court of Appeals) conclusions, then the individual to whom we deny relief need only to 'walk across the street' to gain a different result. Such an unfortunate situation would cause disrespect for the law. It would also result in adding to the already burdensome problems of the Commonwealth's trial courts, which look to us for guidance. Finality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied.
>
> Consequently, in order to alleviate and correct a regrettable situation, the clear indication for this Court

is to accept and follow the decisions of the Third Circuit on this matter until some further word is spoken by the Supreme Court of the United States." *Negri*, supra, at page 122.

The Commonwealth of Pennsylvania therefore respectfully urges that certiorari be granted in the instant cases, so that the growing uncertainty and confusion in this area of the law be resolved and clarified by your Honorable Court.

We note also that the question as to whether *Escobedo* is to be applied retrospectively is still unresolved. There is even uncertainty in the Court of Appeals on this subject (see concurring opinion, Forman, Circuit Judge, Appendix, 27a, et seq.). This important question should also be explicitly determined as your Honorable Court did in *Linkletter v. Walker*, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), with respect to the holding in *Mapp*.

CONCLUSION.

For the foregoing reasons, the Commonwealth of Pennsylvania, by the District Attorney of Philadelphia County, urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, ANTHONY RUSSO, IN OPPOSITION AND CROSS-PETITION BY ANTHONY RUSSO FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix, Pet. App. 1 to 30 are reported in 351 F. 2d 429 (3 Cir., 1965).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing, which petition was denied on October 13, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether a confession elicited from a defendant prior to indictment, when he has been in police custody for eight days and the focus has shifted from a general inquiry into an unsolved crime to an accusatory process and was not advised of his right to counsel or his right to remain silent, is rendered constitutionally inadmissible against him in a State criminal trial?

Constitutional Provisions and Rules Involved

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Rules of Criminal Practice

Rule 3:2-3. Proceedings before the Magistrate

(a) Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.

(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If

the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket.

(c) Preliminary Examination. If the defendant does not waive indictment and trial by jury but does waive preliminary examination, the magistrate shall forthwith bind him over to await final determination of the cause. If the defendant does not waive examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause; otherwise, the magistrate shall discharge him; provided, however, that a magistrate shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecutor may appear and be heard. An entry shall be made on the docket as to when and how such notice was given. The magistrate shall admit the defendant bail as provided by these rules. After concluding the proceeding the magistrate shall transmit, forthwith, to the county prosecutor all papers in the cause in the event the defendant is not discharged; provided, however, that when the county prosecutor so requests the magistrate shall forward the papers to him even though the defendant is discharged. Any bail taken by him shall be transmitted to the county clerk.

Statement of the Case

The record shows that on March 15, 1961, respondent, Anthony Russo, together with two co-defendants attempted to hold up a tavern in Newark, New Jersey. A police officer, victim of the abortive attempt, was off duty and in the tavern at the time. Russo and another defendant, Bisignano, entered the tavern while LaPierre remained outside in a car that had been stolen earlier that evening.

There was testimony that the gun Russo was carrying in his pants pocket became exposed to view when he opened his coat in the tavern and that some movement on his part with respect to the gun precipitated a struggle between Russo and the police officer and in the course of the struggle, there was an exchange of shots between Russo and the officer which resulted in the death of the officer and the wounding of Russo in his right arm.

Russo was apprehended in the evening of March 15, 1961 and admitted to the Martland Medical Center, Newark, New Jersey. After emergency treatment was rendered to Russo, he was questioned for a short time by four members of the Newark Police Department at some time generally between the hours of 1:45 A.M. and 2:45 A.M. (R 1137, 1171, 1176, 1182), but he refused to admit complicity in the crime.

Russo also refused to permit an operation for the removal of the bullet from his arm. Because the pain from the bullet became excruciating, Russo submitted to an operation on March 17, 1961. He was accompanied to the operating room by a police officer. Upon his return from the operating room two police officers visited Russo and questioned him concerning the incident of March 15, 1961. The two officers told Russo that the co-defendants, La-

Pierre and Bisignano, had made statements to the police, and also one Veronica, and they discussed parts of the statements with Russo.

After the operation, Russo was detained at the hospital until March 24, 1961 at which time he was released from the hospital in the custody of the police. It is undisputed that during Russo's entire detention in the hospital, he was under constant police guard. While detained at the hospital, he was shackled to the bed. During the eight day period at the hospital, Russo was interrogated at different intervals by the police officers. The Prosecutor of Essex County also visited Russo at the hospital on March 17, 1961 (R 1198).

After his release from the hospital, he was immediately taken by police officers to the Newark Police Headquarters for interrogation on March 24, 1961. Lieutenant Kinney testified that he saw the defendant on March 24, 1961 between 12:00 P.M. and 1:00 P.M. and that he had certain conversations with the defendant. On cross-examination, Lt. Kinney admitted that he made no representation to Russo as to his right of advice of counsel before he spoke (R 1161). According to the police testimony, the taking of the written statement began about 1:00 P.M. and was completed about 4:05 P.M.

Russo was not arraigned on March 24, 1961 but was detained at police headquarters from that date to March 28, 1961, where he was taken before a Magistrate. However, on March 28, 1961, Russo's hearing was postponed until April 4, 1961. No explanation appears in the record as to the reason for the postponement. On March 30, 1961, the Grand Jury of Essex County, New Jersey returned an indictment for murder against the defendant. No preliminary hearing was granted to the defendant.

On the limited issue of the voluntariness of the confession, Russo testified he was taken, handcuffed, to the hospital in the early morning of March 16, 1961 in a patrol wagon. When he entered the hospital, a policeman hit him in the stomach (R 1186). He was examined, x-rayed and taken to the first floor of the hospital where he was visited by several police officers. They questioned him, grabbing him, then he got a "shot in the face" (R 1188). On March 17, 1961 he was interrogated by the Prosecutor of Essex County, New Jersey.

After the operation of March 17, 1961, he was questioned by two police officers who wanted him to give them a statement, but he refused. Russo claimed that they abused him and tortured his arm. Ultimately, he was taken to the police headquarters on March 24, 1961 with his arm in a sling. When he arrived at the police headquarters, the sling was taken off. While at police headquarters Russo described the treatment given him by Sgt. Buerle and the threat that if he did not sign the written statement the police would take the typewriter and smash it on his arm. Russo also testified that his arm was giving him considerable pain; that he was being mistreated by Lt. Kinney and that Det. Richards threatened to throw coffee at him. Russo claimed that he eventually signed the statement because he was in pain and by that time he would have signed anything (R 1194).

At the trial in the Essex County Court, Law Division, held at Newark, New Jersey there was psychiatric testimony to the effect that Russo was "within the lower reaches of the average range of intelligence." There was evidence that Russo was "markedly deficient with respect to his capacity for verbal abstraction, the capacity to think abstractly, and the capacity to evaluate external reality

with any validity, with any substance, with any genuine understanding of what is going on around him * * * that his social judgment and perceptual alertness were massively impaired with respect to what the norm might be." The record also shows that at the time of the incident, Russo was twenty-one years old and awaiting sentence for armed robbery.

The Essex County Jury returned a verdict of guilty of first degree murder without any recommendation for mercy, which is the death penalty in the State of New Jersey. On appeal to the Supreme Court of New Jersey, Russo's conviction was affirmed. See *State* v. *LaPierre*, 39 N. J. 156 (1963).

Thereafter, Russo filed a petition for Habeas Corpus Relief in the United States District Court for the District of New Jersey. On the return day of the Writ of Habeas Corpus before the United States District Court, additional testimony was taken relating to Russo. Jean Wiener, a supervising nurse at Martland Medical Center testified that on March 16, 1961 she observed the defendant and his right arm had been shot. She recalled that Russo was yelling as she walked down the hall "I didn't do it, I didn't do it." On March 17, 1961 at 3:00 A.M. she again saw Russo and his face looked swollen. She said, "what happened to your face", and he replied, "they beat me". She also stated that a Mrs. Hall, another nurse, had difficulty in administering nursing care to Russo because of a manacle on his leg, which was corroborated by Juanita Hall. There was also testimony by Dr. John F. Donato that on March 21, 1961, he saw evidence of welts on the arm of Anthony Russo. In his opinion, the results were due to an allergic reaction either to penicillin or parazyme. On cross-examination, he testified that he could not tell

with any degree of medical certainty whether the welts came from allergy or trauma and that his initial conclusion that it was a result of a penicillin reaction he would have to assume certain facts which he did not know, and which were not before him.

The United States District Court made affirmative findings that at no time prior to the signing of his confession did the police inform Russo that he had a right to remain silent; that he had a right to counsel; and that anything he said could be used against him. It further appears that not until April 4, 1961 was Russo informed of his rights. These findings of the United States District Court were affirmed by the United States Court of Appeals (Pet. App. 6a).

The United States District Court denied the Writ of Habeas Corpus. Russo thereafter filed an appeal from the denial of Habeas Corpus Relief with the United States Court of Appeals for the Third Circuit. On May 20, 1965, that Court reversed the judgment of the United States District Court for the District of New Jersey and granted Russo a petition of Habeas Corpus.

Thereafter, the State of New Jersey filed a petition for rehearing in the United States Court of Appeals for the Third Circuit which petition was denied in an Order filed on October 13, 1965.

ARGUMENT

The decision below is clearly correct.

1. Petitioner admits that *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) was surely a logical follow up to *Massiah* v. *United States*, 377 U. S. 201 (1964), (Petitioner's Brief,

p. 14) but attempts to limit the application of this constitutional rule to the particular facts. The Petitioners also find fault with the reasoning of the Court below when it said "The effect of *Gideon* has been to expand the right to counsel and there has also been a widening of the concept of stage or stages when that right attaches. We conclude that it is now the law that the right to counsel is present at every critical stage of the proceedings."

In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) this Court discarded the "fundamental fairness" test of *Betts* v. *Brady*, 316 U. S. 455 (1942), and held that the right to Court appointed counsel in State trials was guaranteed by the Fourteenth Amendment's due process clause. Prior to the decision of *Gideon* this Court in *Hamilton* v. *Alabama*, 362 U. S. 52, 54-55 (1961) held that since the arraignment "may affect the whole trial" it was a critical stage at which the defendant had a right to the assistance of counsel without regard to "whether prejudice resulted". The *Hamilton* holding was extended in *White* v. *Maryland*, 373 U. S. 59 (1963) where this Court held that the preliminary hearing in *Maryland* was a "critical stage" at which the defendant had a right to counsel unqualified by judicial analysis of the degree of prejudice.

Thereafter in 1964, this Court in *Massiah* v. *United States*, 377 U. S. 201 held that in the post-indictment stage any statement elicited by the police in absence of counsel is inadmissible. The *Massiah* decision was given further expression in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), when this Court applied the rule of *Massiah* to a post-indictment interrogation where counsel had been neither retained nor requested.

Significantly, it should be noted that the New Jersey Supreme Court in *State* v. *Blanchard*, 44 N. J. 195 (1965)

refused to give full recognition to the principal enunciated in *Massiah* v. *United States.* However, the New Jersey Supreme Court was compelled to reverse its position in *State* v. *Green,* —— N. J. ——, decided on December 23, 1965 and now holds that "In the light of *McLeod* we must now interpret *Massiah* as holding that after a defendant is indicted, any statement elicited by the police in the absence of counsel is inadmissible even where the statement is voluntarily given.

In *Escobedo* v. *Illinois,* 378 U. S. 478, 492 (1964) this Court held that the right of counsel attaches when the process shifts from the investigatory to the accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here the accused must be permitted to consult with his lawyer. The confession obtained by the police in *Escobedo* was held inadmissible because it was obtained in violation of defendant's right to the assistance of counsel under the Sixth Amendment as made obligatory upon the States by the Fourteenth Amendment. The effect of *Escobedo* is to extend the "critical stage" of *Hamilton* v. *Alabama, supra,* forward into the pre-indictment investigation, to the point at which "the process shifts from the investigatory to the accusatory". Mr. Justice Goldberg noted that the interrogation of *Escobedo* was "surely as critical as was the arraignment in *Hamilton.* . . . Thus, a characteristic of the "critical stage" is the accrual of an unqualified right of counsel. *Escobedo* holds that the absence of counsel after the right has accrued is itself a violation of a constitutional right and a justification for reversal of any subsequent conviction.

At the time Russo's confession was obtained, the focus had shifted from the investigatory to the accusatory. At the time Russo confessed, the police had the confessions

of the two co-defendants. Additionally, as to Russo, the police were in possession of a liquor bottle and its carton, both of which contained Russo's fingerprints. Russo's general description was given to the police by eye witnesses and he had been identified as possibly being one of the hold-up men. The finding by the Court below that the focus had shifted from the investigatory to the accusatory is amply supported by the record.

Petitioner in its attempt to restrict *Escobedo* to the facts of that case, finds fault with the Circuit Court's conclusion, "We perceive no sound basis for holding that a request for counsel is a pre-requisite for the right to counsel at the interrogation stage while not at any other". We submit that this conclusion is eminently correct even though there is a factual distinction between the *Escobedo* case and this case, namely the request for counsel. That *Danny Escobedo* prior to his arrest had retained counsel while Russo was unable to retain one does not delimit the applicability of the *Escobedo* decision to this case. Decisions of this Court have made it abundantly clear that the right to counsel does not depend upon a request, *Carnley* v. *Cochran,* 369 U. S. 506 (1962); *McLeod* v. *Ohio,* 381 U. S. 356 (1965), and that a waiver of constitutional dimensions is not to be presumed but requires an intentional relinquishment or abandonment of a known right or privilege *Johnson* v. *Zerbst,* 304 U. S. 458, 464.

As the Court below correctly stated, the test of waiver is the same, or should be, no matter what stage of the proceedings is at issue so long as the right has attached. *Escobedo* recognizes this principle, "The accused may, of course, intelligently and knowingly waive his privilege against self incrimination and his right to counsel either at the pretrial stage or at the trial. But no knowing and

intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case." 378 U. S. at 490.

Escobedo had previously consulted with his attorney and apparently was acquainted with his constitutional right to remain silent and his right to counsel. Yet, this Court held at the very moment he was confronted with incriminatory statements, he was entitled to the "guiding hand of counsel". *Escobedo* was charged with homicide; Russo was also charged with homicide. Russo was under constant surveillance by the police for eight days while in the hospital. Russo was ultimately assigned counsel. To provide special protection for those who can afford counsel as opposed to those who cannot, would smack of a denial of equal protection. See *Douglas* v. *California*, 372 U. S. 352; *Griffin* v. *Illinois*, 351 U. S. 12. The view advocated here is well expressed by the Supreme Court of California in *People* v. *Dorado*, 42 Cal. Rpt. 169, 178, 398 P. (2) 361, 369, 370, cert. den. 381 U. S. 937: "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it."

It is interesting to note that the Supreme Court of New Jersey rigidly adheres to the factual pattern of *Escobedo* and holds that in the absence of a specific request for counsel, *Escobedo* is inapplicable. Recently, in December, 1965, in *State* v. *Green*, that court held that the failure of the

police in the post-indictment stage to advise the defendant of his right to obtain legal assistance and that if he were indigent, counsel would be assigned, was not a waiver of his constitutional right of the assistance of an attorney and further held that any statements elicited in the absence of counsel is inadmissible, even where the statement is voluntarily given. It would thus seem that the New Jersey Supreme Court has placed itself in an anomalous position applying different standards of waiver depending upon the pre-indictment and the post-indictment stage.

Those Courts that have limited the application of *Escobedo* have done so by relying on the "request" feature. In contrast, those Courts that have applied *Escobedo* to the present situation, have done so by a careful examination of *Escobedo* in the context of the recent right to counsel cases. Accord *State* v. *Dufour*, 206 At. (2) 82 (R. I. 1965); *State* v. *Neely*, 239 Orc. 487, 398 P. (2) 482 (1965); *People* v. *Dorado*, 398 Pac. (2) 482 (1965).

2. Initially, it is to be observed that the issue of retroactivity was not raised before the United States District Court nor in the Court below, except by petition for rehearing. The Court below declined to pass upon the issue of retroactivity where it had been raised for the first time in this fashion. However, since the Petitioner has raised the point, we will answer it.

Gideon v. *Wainwright*, 372 U. S. 335 (1963) established that every person accused of a crime, whether State or Federal, is entitled to a lawyer at trial and it is judicially accepted that *Gideon* is entitled to retroactive effect: *Tehan* v. *Shott*, —— U. S. —— (1966); *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *United States* v. *La Vallee*, 330 F. 2d 303 (2 Cir. 1964). Following *Gideon*, this Court ruled in *Massiah* v. *United States*, 377 U. S. 201 (1964) that

in the post-indictment stage, the criminal defendant has a right to assistance of counsel. Thereafter, in *Escobedo* v. *Illinois*, 378 U. S. 478, 486 (1964) the right to assistance of counsel was extended to the pre-indictment interrogation, the Court emphasizing that "* * * It would exalt from over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." *Escobedo* extended to the pre-indictment interrogations the right established by *Gideon* to counsel at trial. Thus the doctrine enunciated in *Gideon* v. *Wainwright* relating to the assistance of counsel is extended in *Escobedo* to the time when the process shifts from the investigatory to the accusatory stage. When that stage is reached, the accused is entitled to a lawyer. Since *Gideon* has been applied retroactively and *Escobedo* is an extension in time of its principle, it follows that *Escobedo*, too. should be given retroactive effect.

As this Court said in *Gideon* v. *Wainwright*:

> "A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell* v. *Alabama*: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he

> faces the danger of conviction because he does not know how to establish his innocence.' 287 U. S. [45] at 68-69, 53 S. Ct. [55] at 64, 77 L. Ed. 158."

In *Escobedo* it was recognized that these same considerations were applicable at a pre-indictment interrogation. Using the same words of Justice Sutherland as *Gideon* cited, the Court said that "the 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." It continued "This was the stage when legal aid and advice were most critical to petitioner." Therefore we submit that there can be no basis for distinguishing the two cases in terms of the retroactivity of their application.

The direct connection between *Gideon* and *Escobedo* can be seen also in the fact that both cases are based upon the Sixth Amendment provision that "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." If the Sixth Amendment guarantee is to be given retrospective effect in one decision, then it is surely unreasonable to deny that guarantee the same effect in another. The Petitioner advances the proposition that this Court should deny the constitutional right enunciated in *Escobedo* to those who happened to be tried before the decision was rendered. To accept this thesis would be to assign a lower constitutional status to pre-*Escobedo* prisoners than to pre-*Gideon* prisoners where the same constitutional amendment is involved. It would deny a right so fundamental and essential that it is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution; a right that has been characterized by this Court as a "basic minimal" right vouchsafed by the Constitution. *Rideau* v. *Louisiana*, 373 U. S. 723 (1963).

In *Linkletter* v. *Walker*, 381 U. S. 618 the Court held that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, was not to be given retroactive effect. This Court also stated that it would apply its decision retrospectively when "the principle we applied went to the fairness of the trial—the very integrity of the fact-finding process." Since *Escobedo* extends to the pre-indictment interrogation, the time at which the right to counsel attaches, it should follow that the right is as fundamental and basic to a fair proceeding at that stage as at trial. By the Court's own criterion of fairness then, *Escobedo* should be accorded retrospective effect. Any attempt to distinguish between the right to counsel at trial (established by *Gideon*) and the right to counsel at the interrogation stage, (established by *Escobedo*) is rejected by this Court in *Escobedo*, 378 U. S. 487, 488:

> "* * * The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation: and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U. S. 330, 344, 1 L. Ed. 2d 376, 387, 77 S. Ct. 510 (Black, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' Ex parte Sullivan, 107 F. Supp. 514, 517-518."

While *Gideon* and *Escobedo* were both concerned with the issue of right to counsel, *Mapp* was concerned with the entirely different problem of illegal search and seizure. *Gideon* and *Escobedo* were both based on the same

Amendment—the Sixth—while *Mapp* is based upon the Fourth. Moreover, *Mapp* v. *Ohio* was essentially a rule aimed at discouraging certain kinds of undesirable conduct by the police. That this is so is indicated by the words of the *Mapp* opinion, the nature of the Fourth Amendment guarantee which does not directly concern the judicial process, and by the historical development of the *Mapp* decision from *Wolf* v. *Colorado*, 338 U. S. 25. It involved no question of the guilt or innocence of a defendant. The *Gideon* and *Escobedo* decisions however directly concerned the validity of the process by which the accused are found guilty.

Judge Forman in his concurring opinion on the denial of the petition for rehearing in this case summarized the two critical factors which reflect the underlying policy of the Escobedo rule. 1. The assistance of counsel at the accusatory stage of the proceeding enables the accused to properly exercise his right. 2. Implementing a right to counsel at the accusatory stage assists in the difficult task of resolving the question of coercion where a confession is obtained during a closed interrogation. (Pet. App. 28a). Judge Forman further made this pertinent statement when he said "When a conviction is sought assisted by the introduction of a confession, failure to apply the *Escobedo* rule (which now enables the accused to properly exercise his rights at the accusatory stage of the proceedings maximizes the ability of the judiciary to rule on the voluntariness of a confession) has the potential to impair the fairness of a trial and to weaken the integrity of the fact-finding process."

As we have seen from the discussion of the right to counsel, the voluntariness or involuntariness of a confession is not the only standard by which the fairness or in-

tegrity of a criminal prosecution is to be measured. It is apparent however, that this Court in *Escobedo* gave great consideration to the issue. It spoke quoting *Haynes* v. *Washington*, 373 U. S. 503 (1963), of the fact that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . and emphasized that promises contingent upon confession had been made to the accused. Thus, this Court recognized the voluntariness of *Escobedo's* confession was still at issue despite the finding of the lower court that it was voluntarily, and indicated that the question of voluntariness could not be satisfactorily settled in any case without an attorney being present. In essence then, *Escobedo* made the factor of counsel non-participation at the accusatory stage of the proceeding another independent basis for confession inadmissibility. On this ground, too, *Escobedo* should be made to apply retroactively.

This court in the very recent case of *Tehan* v. *Shott*, —— U. S. —— (1966) held that the rule enunciated in *Griffin* v. *California*, 380 U. S. 609 (1965) does not require retroactive application. One of the reasons advanced was, "By contrast, the Fifth Amendment privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society and the right of each individual to be left alone." In the very same case, this Court held, "The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding

with the clear danger of convicting the innocent. See *Gideon* v. *Wainwright,* 372 U. S. 335, *Dougherty* v. *Maxwell,* 376 U. S. 202, *Griffin* v. *Illinois,* 351 U. S. 12; *Eskridge* v. *Washington Prison Board,* 357 U. S. 214. The same can surely be said of the wrongful use of a coerced confession. See *Jackson* v. *Denno,* 378 U. S. 368; *McNerlin* v. *Denno,* 378 U. S. 575; *Reck* v. *Pate,* 367 U. S. 433."

Since this is a capital case we submit that the *Gideon-Escobedo* rule should have been applied in theory at least since *Betts* v. *Brady,* U. S. 455 (1942). The genesis of the *Gideon* Rule is found in *Powell* v. *Alabama,* 287 U. S. 45 (1932) where the Court said "he requires the guiding hand of counsel at every stage in the proceedings against him." In *Gideon* this Court said the fact is that in deciding as it did—that "appointment of counsel is not a fundamental right essential to a fair trial—the court in *Betts* v. *Brady* made an abrupt break with its own well-considered precedents and "The Court in *Betts* v. *Brady* departed from the sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested."

In any case, the effect of applying the *Escobedo* decision retroactively would not be so severe as the Petitioner contends. Prisoners would not necessarily be released, but only retried. If found guilty, they would be subject to the imposition of harsher fines and sentences than they originally received. This fact alone would probably deter many prisoners from instituting *habeas corpus* proceedings.

Paraphrasing the language of *Palumbo* v. *New Jersey,* 334 Fed. 2d 254 (1964) it is, of course, possible that some persons "who present reasonable risks of ever becoming productive citizens", would be released by giving *Escobedo* retrospective effect, however as the *Palumbo* opinion con-

inues "This unfortunate effect . . . will disappear with-
n a few years. It is, we suspect, in the nature of growing
ains of a society dedicated to establishing an ordered
ense of liberty for every individual be he indigent or not."
p. 531).

CONCLUSION

For the foregoing reasons, it is respectfully urged that his petition for a writ of certiorari should be denied.

[Cross Petition Follows]

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent and cross petitioner, Anthony Russo, prays that a writ of *certiorari* issue to review the decision of the Court below holding that Respondent's confession was not coerced in violation of the Fourteenth Amendment. The writ to issue only in the event this Court should grant the petition for a writ of *certiorari* in No. 834 in this term.

Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix, pp. 1a to 30a are reported in 351 F. 2d 429 (3 Cir., 1965).

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing, which petition was denied on October 13, 1965.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented on Cross-Petition

Is due process of law denied to a defendant by the admission into evidence of a confession obtained under circumstances whose totality presents a picture of overbearing defendant's free will?

Constitutional Provisions and Rules Involved

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Rules of Criminal Practice

Rule 3:2-3. Proceedings before the Magistrate

(a) Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.

(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket.

(c) Preliminary Examination. If the defendant does not waive indictment and trial by jury but does waive preliminary examination, the magistrate shall forthwith bind him over to await final determination of the cause. If the defendant does not waive examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause, otherwise, the magistrate shall discharge him; provided, however, that a magistrate shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecu-

tor may appear and be heard. An entry shall be made on the docket as to when and how such notice was given. The magistrate shall admit the defendant bail as provided by these rules. After concluding the proceeding the magistrate shall transmit, forthwith, to the county prosecutor all papers in the cause in the event the defendant is not discharged; provided, however, that when the county prosecutor so requests the magistrate shall forward the papers to him even though the defendant is discharged. Any bail taken by him shall be transmitted to the county clerk.

Statement of the Case

In Cross-Petitioner's answering brief, the statement of facts is set forth therein and Cross-Petitioner makes them a part hereof.

Reasons for Granting the Writ

On the issue of voluntariness, the Court below found Russo's confession voluntary. Under the circumstances of this case, we submit that this holding is in conflict with previously rendered decisions of this Court. In its opinion the Court below after describing the police activities while Russo was confined to the hospital said "Interrogation of Russo under the circumstances seems repugnant to concepts of fairness". (Pet. App. 9)

Any questioning by police officers which in fact produces a confession which is not the product of a free intellect is inadmissible. *Townsend* v. *Sain*, 372 U. S. 293 (1962). If an individual's "will was overborne" or if his confession was not the product of a rational intellect and free will "his confession is inadmissible because coerced". *Reck* v.

Pate, 367 U. S. 433 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 208. The question in each case is whether the defendant's will was overcome at the time he confessed. The use in a State criminal trial of a defendant's confession, obtained by coercion, whether physical or mental is forbidden by the 14th Amendment. *Leyra* v. *Denno*, 347 U. S. 556.

Comparison of the facts in the case at bar with the facts of some leading coerced confession cases compels the conclusion that the Cross-Petitioner's inculpatory statements were neither in fact nor in law the product of a free intellect. The undisputed facts revealed that the Cross-Petitioner was subjected to a combination of coercive forces as overwhelming as any involved in recent coerced confession cases, in which convictions of state prisoners have been set aside in the United States Supreme Court. Indeed, the undisputed facts in this case show a totality of circumstances even more compelling than the circumstances present in a number of leading cases. The following comparison of the significant undisputed facts of this case with the facts of some of the leading cases in which confessions have been held involuntary is offered for the purpose of substantiating these assertions.

Protracted police questioning of an accused while he is held incommunicado and without being advised of his constitutional rights is highly significant to the constitutional conclusion in a coerced confession case. Such interrogation has been held to be inherently coercive. E.g., *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); also *Callegos* v. *Colorado*, 370 U. S. 49, 51 (1962). Detention of an accused in the complete and exclusive control of the police "breeds coerced confession" and is root of the evil. *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949).

In *Ashcraft* v. *Tennessee, supra,* the interrogation lasted for 36 hours, somewhat longer than the interrogation here, but the witness was a mature man of intelligence and standing in the community. He apparently was in good health. In the case at bar, the questioning of the Cross-Petitioner began on March 17, 1961, while he was in the hospital certain admissions were obtained from him. At that particular time surgery had just been completed. Upon his discharge from the hospital he was immediately taken to the Newark Police Headquarters at 11:00 A.M., questioned and the signing of the confession was completed at 4:05 P.M. The physical state of the accused is, of course, a relevant factor on the issue of voluntariness. See *Colombe* v. *Connecticut,* 367 U. S. 568, 602 (1961); *Reck* v. *Pate,* 367 U. S. 433, 441-43 (1961).

Other decisions have found confessions to be involuntary even when derived from much shorter periods of interrogation than those involved in the *Ashcraft* case. In *Malinski* v. *New York,* 324 U. S. 401 (1945), the accused was arrested at 8:00 A.M.; he confessed at 6:00 P.M. although he was not questioned constantly and was allowed to have private conversation with a friend. Cross-Petitioner, on the other hand, did not speak to any friendly person until after the police had extracted the last of his inculpatory statement on March 24, 1961. In fact, he was held incommunicado for nine days under police guard at the Martland Medical Center. During that period of time police did not advise him of his constitutional rights nor was he told that he had the right to refuse to make a statement; nor was he told that any statement that he might make could be used against him and was not told of his right to be represented by counsel.

In *Spano* v. *New York,* 360 U. S. 315, the accused surrendered to the authorities at 7:00 P.M. and the last of

of his incriminating statements was made at 6:00 A.M. the next morning, after nine hours of actual questioning. He had not been allowed to consult with his attorney but presumably was aware of his right to one and specifically had been advised to remain silent, as Russo had not been. Spano had a history of emotional instability, but Russo was also maladjusted and a few years younger. The sum of these facts surely have as much constitutional significance as the denial of Spano's request to see his previously retained attorney. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964).

In *Culombe* v. *Connecticut,* 367 U. S. 568 (1961), the accused was apprehended on Saturday and did not confess until the following Wednesday, but the most extended session of questioning prior to the first confession ran only three and one half hours and included substantial respites. He received ample food and sleep; there was no claim of physical brutality. Throughout his detention the accused displayed a cooperative attitude between his interrogations. Moreover, Culombe, although of low intelligence was 33 years old and in good health. It could hardly be presumed that he was more suggestible or susceptible to intimidation than was Cross-Petitioner, who at the time of his ordeal with the police was only 21 years of age, had a history of emotional disturbance and was weakened by the lingering effects of his surgery.

In *Haley* v. *Ohio,* 332 U. S. 596 (1948), a 15 year old boy confessed after five hours questioning, when confronted with false confession made by alleged accomplices. He was not advised of his right to counsel and to remain silent until the signing of the confession. Though Russo was six years older he was interrogated at the hospital and thereafter at the police headquarters from 11:00 A.M. until 4:05 P.M., he likewise was not advised of his rights. The

Supreme Court found that Haley's confession should have been excluded and we submit that this conclusion logically extends to Russo as well.

In *Haynes* v. *Washington,* 373 U. S. 503 (1963), there was no claim of physical abuse, deprivation of food or rest, or uninterrupted long periods of questioning. The accused was a mature individual who had a record of previous contacts with the police. Haynes confessed his crime once to the arresting officers on the way to the police station, again after ½ hour of questioning that evening, and again during 1½ hours of questioning the next morning. The last confession was signed that afternoon, 16 hours after arrest and admitted into evidence. This confession was held to have been coerced through the combination of a threat of continued detention and the promise that defendant could see his family if he confessed. This pressure falls far short of that to which Russo was subjected for a longer period of time and with a lesser ability to resist, considering his emotional instability and physical pain resulting from surgery.

Also of high significance to the constitutional conclusion that the confession is coerced is the attitude of the police as revealed by certain objective facts. The attitude is noteworthy because it bears on what really happened during the secret interrogations, a subject of inevitable dispute, between the accused and the police. In *Haley* v. *Ohio, supra,* the accused, a 15 year old boy, confessed to participation in a murder after five hours of questioning. Although a newspaper photographer was allowed to see him and to take his picture, as soon as he confessed neither his mother nor his lawyer was allowed to see him until several days later. The Court pointed out that these facts showed a callous police attitude of their methods in extracting the confession. Id. at 600. The same source of callous police attitude

is revealed in this case by a host of undisputed facts such as the persistent questioning by Cross-Petitioner, first at the hospital and thereafter at police headquarters, by the failure at any time during his period of hospitalization and at the interrogation to advise him of his right to counsel; by the failure to inform him of his right to remain silent and by the long delay in bringing Cross-Petitioner before a Magistrate, a delay which persisted even after he had made the alleged confession.

What was said by the United States Court of Appeals for the Second Circuit in *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7, 16, Cert. Den. 357 U. S. 908 (1958), is equally appropriate to this case:

> "When law enforcement officials create a situation where those in custody have no means of communicating with the outside world and no way of calling their plight to the attention of any disinterested persons for as long as 23 hours, common sense requires that we conclude that the observance of the constitutional rights of their prisoners was secondary to obtaining incriminating statements from those so isolated. Such methods are inherently coercive."

Delay in arraignment, aside from its bearing on the attitude of the police, has been considered a significant factor in the totality of circumstances which must be considered in determining whether a confession is involuntary. *Payne* v. *Arkansas,* 364 U. S. 560, 563 (1958); *Fikes* v. *Alabama,* 352 U. S. 191, 199 (1957); *Watts* v. *Indiana,* 338 U. S. 49, 56-57 (1949). Here, in this case, for 9 days while Cross-Petitioner was hospitalized there was no arraignment. The confession was obtained on March 24, 1961. The arraignment and preliminary hearing scheduled for March 28, 1961

were adjourned without explanation on the record herein until April 4, 1961. In the interim, on March 30, 1961 the Cross-Petitioner was indicted.

It is submitted that the true rule as stated in *Culombe* v. *Connecticut*, 367 U. S. 568, 581-582, applies herein:

> "Its essence is the requirement that the State which proposes to convict and punish an individual produce evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

CONCLUSION

For the foregoing reasons, it is respectfully urged that in the event the Court shall grant a petition for writ of certiorari in No. 834, this petition for writ of certiorari should likewise be granted.

Respectfully submitted,

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